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Supreme Court of the United States

OCTOBER TERM, 1951

No. 85

IDONAH SLADE PERKINS, PETITIONER,

vs.

BENGUET CONSOLIDATED MINING COMPANY, AN ALIEN BUSINESS ASSOCIATION KNOWN AS A SOCIEDAD ANONIMA ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED MAY 29, 1951.

CERTIORARI GRANTED OCTOBER 8, 1951.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE COURT OF COMMON PLEAS OF CLERMONT COUNTY, OHIO

No. 22185

IDONAH SLADE PERKINS, Plaintiff,

vs.

BENGUET CONSOLIDATED MINING COMPANY, an Alien Business Association Known as a Sociedad Anonima, Organized and Existing Under the Laws of the Philippine Islands; John W. Haussermann, Parent, President, General Manager, Controlling Member and the Duly Authorized Representative in the United States of the Benguet Consolidated Mining Company, an Alien Business Association Known as a Sociedad Anonima, Organized and Existing Under the Laws of the Philippine Islands; First National Bank of Cincinnati, Ohio, a National Banking Corporation Organized and Existing Under the Laws of the United States, and New Richmond National Bank, a National Banking Corporation Organized and Existing Under the Laws of the United States, Defendants

PETITION—Filed April 4, 1947

Now comes the plaintiff, Idonah Slade Perkins and, for her cause of action, states that the defendant, Benguet Consolidated Mining Company, is a business association existing and doing business as a sociedad anonima under and by virtue of the laws of the Philippine Islands, having its principal place of business in the city of Manila, Philippine [fol. 2] Islands; that said defendant is engaged in the business of conducting mining operations upon certain properties in the Philippine Islands, extracting therefrom gold and silver and marketing same in the United States and throughout the world; that the president, general manager, controlling member and parent of said defendant is the defendant, John W. Haussermann; and that said defendant business association has issued and outstanding capital stock, evidenced by certificates for twelve million (12,000,-

000) shares, owned in part by citizens of the United States and in part by aliens.

Plaintiff further states that the defendant, John W. Haussermann, is the president and general manager of the said Benguet Consolidated Mining Company; that the said defendant is the controlling member of the business association known as Benguet Consolidated Mining Company; that the said defendant directly controls the operation, policies and management of the said Benguet Consolidated Mining Company; that the said defendant is the duly authorized representative of the said Benguet Consolidated Mining Company in the United States, and designated by said company with the Securities Exchange Commission of the United States as parent of said company; and that said defendant is a resident of the county of Clermont, state of Ohio.

Plaintiff further states that the defendant, First National Bank of Cincinnati, Ohio, is a national banking corporation, organized and existing under the laws of the United States; that the defendant, Benguet Consolidated Mining Company, is the owner of certain moneys and funds believed by this plaintiff to be on deposit in said defendant, [fol. 3] First National Bank of Cincinnati, Ohio, in the name of John W. Haussermann, President No. 1 and in the name of John W. Haussermann, President No. 2.

Plaintiff further states that the New Richmond National Bank is a national banking corporation organized and existing under the laws of the United States; that the defendant, Benguet Consolidated Mining Company, is the owner of certain moneys and funds believed by this plaintiff to be on deposit in said defendant, New Richmond National Bank, in the name of John W. Haussermann, President No. 1 and in the name of John W. Haussermann, President No. 2.

Plaintiff further states that on the first day of April, 1940, she was, ever since has been and now is, the owner of one hundred forty-four thousand (144,000) shares of the capital stock of the defendant, Benguet Consolidated Mining Company; that defendant business association declared upon each share of its capital stock certain dividends, each of which dividends was made payable upon the dates hereinafter set forth and each of which dividends was

and is equivalent in lawful money of the United States to the sums hereinafter specified, to wit:

Date Dividend Payable 1940	Rate in Philippine money	Rate in United States money	Total Dividends
June 30	15 centavos	.075	$10,800.00
September 30	15 centavos	.075	10,800.00
December 20	20 centavos	.10	14,400.00
Total 1940	50 centavos	.25	$36,000.00

[fol. 4]

Date Dividend Payable 1941	Rate in Philippine money	Rate in United States money	Total Dividends
March 31	15 centavos	.075	$10,800.00
June 30	15 centavos	.075	10,800.00
September 30	15 centavos	.075	10,800.00
Total 1941	45 centavos	.225	$32,400.00

That the total of said dividends so declared and made payable upon said one hundred forty-four thousand (144,000) shares of capital stock of defendant business association owned by this plaintiff amounts, in lawful money of the United States to the sum of sixty-eight thousand four hundred ($68,400.00) dollars.

Plaintiff further states that although she has made numerous demands for payment of said cash dividends upon the defendants, Benguet Consolidated Mining Company and John W. Haussermann, said defendants have failed, refused and neglected, and still fail, refuse and neglect to pay to said plaintiff said sum of sixty-eight thousand four hundred ($68,400.00) dollars, or any of the interest accrued therein, excepting the sum of eight thousand three hundred thirteen and 11/100 ($8,313.11) dollars recovered by this plaintiff in an attachment action against the said defendant, Benguet Consolidated Mining Company, in the courts of the state of California; that the whole of said sum of sixty-eight thou-

sand four hundred ($68,400.00) dollars, excepting the said sum of eight thousand three hundred thirteen and 11/100 [fol. 5] ($8,313.11) dollars together with interest on said dividends as the same became due and payable as hereinabove set forth, is still due, owing and unpaid from defendants, Benguet Consolidated Mining Company and John W. Haussermann, to this plaintiff.

Plaintiff further states that said defendants, Benguet Consolidated Mining Company and John W. Haussermann, have wrongfully refused and failed to pay said cash dividends to this plaintiff for the purpose of and with the result of wrongfully depriving this plaintiff of her property.

Wherefore, plaintiff prays judgment against defendants, Benguet Consolidated Mining Company and John W. Haussermann, for the sum of sixty-eight thousand four hundred ($68,400.00) dollars, together with interest upon the amount of each of said dividends from the date upon which each of said dividends became due and payable, less the sum of eight thousand three hundred and thirteen and 11/100 ($8,313.11) dollars; for a temporary restraining order restraining defendants, First National Bank of Cincinnati, Ohio, and New Richmond National Bank, from permitting the withdrawal of any funds, moneys or property owned by Benguet Consolidated Mining Company held or on deposit with said defendants in the name of the defendant, Benguet Consolidated Mining Company or in the name of John W. Haussermann, President No. 1 or in the name of John W. Haussermann, President No. 2 or in the name of any other person, firm or corporation, from the jurisdiction of this court until final determination of the rights of the parties; for an order of attachment to issue against said [fol. 6] funds, moneys or property in the possession or under the control of said defendants, First National Bank of Cincinnati, Ohio, and New Richmond National Bank; and for her costs herein expended.

Cors, Scherer & Hair, Attorneys for Plaintiff.

[Duly verified.]

IN COURT OF COMMON PLEAS

SUMMONS

The State of Ohio, Clermont County.—To the Sheriff of Clermont County:

You are hereby commanded to notify John W. Haussermann, New Richmond, Ohio, and the Benguet Consolidated Mining Co. by serving a copy on John W. Haussermann, president and general manager of said company, also The New Richmond National Bank, New Richmond, Ohio, that they have been sued by Idonah Slade Perkins in the Court of Common Pleas of said Clermont county, and must answer by the third day of May, A. D. 1947, or the petition of said plaintiff will be taken as true, and judgment rendered accordingly.

Said sheriff will make due return of this summons on the fourteenth day of April, 1947.

Witness my hand and the seal of said court, this fourth day of April, 1947.

Lee Hannah, Clerk, by Ralph A. Parker, Deputy.

[fol. 7] SHERIFF'S RETURN

The State of Ohio, Clermont county.

Received this writ April 4, 1947, and on April 4, 1947, I served the within named John W. Haussermann and C. J. Meeker, cashier of the New Richmond First National Bank, by personally handing to each of them a true and certified copy thereof with all the endorsements thereon.

Clyde Dericks, Sheriff, by Marvin Bissantz, Deputy.

IN COURT OF COMMON PLEAS

MOTION TO QUASH AND SET ASIDE SERVICE OF SUMMONS AND RETURN OF SHERIFF—Filed May 2, 1947

Comes now the defendant, Benguet Consolidated Mining Company, and appearing specially for the purposes of this motion only and disclaiming any intention of entering other than a special appearance for the purposes of this motion,

hereby moves the court for an order quashing and setting aside the attempted service of summons heretofore issued against this defendant, and for an order quashing and setting aside the return of said attempted service.

Lucien H. Mercier, Nichols, Speidel & Nichols, Ely, White & Davidson, Attorneys for Benguet Consolidated Mining Company.

[fol. 8] IN COURT OF COMMON PLEAS

ALIAS SUMMONS

The State of Ohio, Clermont County.—To the Sheriff of Clermont County:

Again you are hereby commanded to notify John W. Haussermann, New Richmond, Ohio, by serving a copy of the summons on John W. Haussermann, and also the Benguet Consolidated Mining Company, by serving a copy of the summons on John W. Haussermann, president, general manager, controlling member and duly authorized representative agent of said company in the United States and State of Ohio, returnable according to law, that they have been sued by Idonah Slade Perkins in the Court of Common Pleas of said Clermont county, and must answer by the thirty-first day of May, A. D. 1947, or the petition of said plaintiff will be taken as true, and judgment rendered accordingly.

Said sheriff will make due return of this summons on the twelfth day of May, 1947.

Witness my hand and the seal of said court, this second day of May, 1947.

Lee Hannah, Clerk, by Ralph A. Parker, Deputy.
[Seal.]

SHERIFF'S RETURN

The State of Ohio, Clermont County.

Received this writ May 2, 1947, at 11 o'clock a. m. And on May 2, 1947, I served the within named John W. Haussermann, by serving a copy of the summons upon him personally, and also Benguet Consolidated Mining Company,

by serving a copy of the summons personally on John W. Haussermann, president, general manager, controlling member and duly authorized representative and agent in [fol. 9] the United States and state of Ohio, by personally handing to each of them a true and certified copy thereof with all the endorsements thereon.

Clyde Dericks, Sheriff, by Frank Hutchinson, Deputy.

In Court of Common Pleas

Motion to Quash and Set Aside Service of Summons and Return of Sheriff—Filed May 6, 1947

Comes now the defendant, Benguet Consolidated Mining Company, and appearing specially for the purpose of this motion only and disclaiming any intention of entering other than a special appearance for the purposes of this motion, hereby moves the court for an order quashing and setting aside the attempted service of alias summons heretofore issued against this defendant, and for an order quashing and setting aside the return of said attempted service.

Lucien H. Mercier, Nichols, Speidel & Nichols, Ely, White & Davidson, Attorneys for Benguet Consolidated Mining Company.

In Court of Common Pleas

Stipulation—Filed September 20, 1948

It is stipulated and agreed by and between counsel for the plaintiff, Idonah Slade Perkins, and counsel for the defendant, Benguet Consolidated Mining Company, as follows:

1. That this stipulation shall in no wise constitute an entry of appearance in this cause by the defendant, Benguet [fol. 10] Consolidated Mining Company, and that this stipulation is entered into only and specially for the purposes of the motion of the defendant to quash service of summons in this cause.

2. That the testimony, exhibits, briefs and arguments of counsel, introduced in the Court of Common Pleas of Hamilton county, Ohio, in Case No. A-103968, being styled, "Idonah Slade Perkins, plaintiff, vs. First National Bank of Cincinnati, et al., defendants"; by both plaintiff and this defendant, in support of and opposing the motion to quash service of summons filed by this defendant in said cause, and the record of said cause to the date of this stipulation, are hereby introduced in this cause so as to constitute, together with such additional evidence, exhibits, briefs and arguments, as either party may offer, the entire record, evidence, exhibits, briefs and arguments in support of and in opposition to the motion to quash service of summons filed by the defendant, Benguet Consolidated Mining Company, in this cause.

Cors, Scherer & Hair, by Gordon H. Scherer, Attorneys for Plaintiff, Charles E. White, Attorney for Defendant, Benguet Consolidated Mining Company.

[fol. 11] IN COURT OF COMMON PLEAS

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

1947, April 4. Petition filed.

1947, April 4. Affidavit in attachment filed.

1947, April 4. Praecipe filed.

1947, April 4. Summons issued sheriff, Clermont county, Ohio.

1947, April 4. Summons issued sheriff, Hamilton county, Ohio.

1947, April 4. Order of attachment issued sheriff, Clermont county, Ohio.

1947, April 4. Order of attachment issued sheriff, Hamilton county, Ohio.

1947, April 7. Summons returned and filed; sheriff, Hamilton county, Ohio.

1947, April 7. Summons returned and filed; sheriff, Clermont county, Ohio.

1947, April 7. Order of attachment returned and filed, sheriff Hamilton county, Ohio.

1947, April 7. Order of attachment returned and filed, sheriff, Clermont county, Ohio.

1947, May 2. Praecipe filed.

1947, May 2. Alias summons issued sheriff, Clermont county, Ohio.

1947, May 2. Demurrer of defendant New Richmond National Bank filed.

1947, May 2. Demurrer of First National Bank, Cinnati, Ohio, filed.

[fol. 12] 1947, May 2. Motion of Benguet Consolidated Mining Company to quash service of summons and attached memo and affidavit filed.

1947, May 2. Motion of John W. Haussermann requesting additional time to plead filed.

1947, May 3. Summons returned and filed, sheriff, Clermont county, Ohio.

1947, May 6. Motion to quash and set aside service of alias summons and return of sheriff filed.

1947, September 20. Stipulation filed.

1948, November 16. Opinion filed.

1948, December 3. Praecipe filed.

1948, December 3. Order to serve notice on garnishee issued sheriff, Clermont county, Ohio.

1948, December 3. Order to serve notice on garnishee issued sheriff, Hamilton county, Ohio.

1948, December 3. Motion filed.

1948, December 4. Entry sustaining motions to quash service filed.

1948, December 8. Order and notice returned and filed, sheriff, Clermont county, Ohio.

1948, December 11. Motion to strike from files, vacate and set aside the notice to appear of December 4, 1948, filed.

1948, December 11. Motion to strike from files, vacate and set aside the notice to appear of December 4, 1948, filed.

1948, December 14. Notice to serve notice returned and filed, sheriff, Hamilton county, Ohio.

1948, December 15. Notice of appeal.

1948, December 15. Praecipe filed.

[fol. 13] 1948, December 21. Transcript of the Common Pleas docket journal entries filed.

1948, December 22. Entry filed.

1948, December 22. Bond filed.

1948, December 30. Bill of exceptions filed.

1949, January 13. Application for continuance of hearing on motion to strike filed.

1949, February 18. Entry sustaining demurrer filed.

1949, May 27. Bill of exceptions refiled in Court of Appeals.

1949, July 8. Entry sustaining motion to strike from files, vacate, and set aside notice filed.

1949, July 8. Entry sustaining motion to strike from files, vacate, and set aside notice filed.

1949, July 13. Notice of appeal and praecipe for transcript filed.

1949, July 13. Transcript of the Common Pleas docket journal entries refiled.

ORDER VACATING AND SETTING ASIDE PURPORTED SERVICE OF SUMMONS AND ALIAS SUMMONS

December 4, 1948. This cause having heretofore been submitted to this court upon the motions of the defendant, Benguet Consolidated Mining Company, filed under a special appearance, to quash and set aside service of original and alias summons on the ground that in its organization it is the American equivalent of a foreign corporation, and that it was not doing business in Ohio at the time of the service of summons, the court, upon due consideration of said motion, of the evidence before it, the oral and written arguments of counsel for plaintiff and defendant, Benguet Consolidated Mining Company, and the law on the subject, finds:

1. That the defendant, Benguet Consolidated Mining Company, which was organized under the laws of the Philip- [fol. 14] pine Islands as a sociedad anonima, is to be deemed a foreign corporation within the meaning of the laws of Ohio governing service of summons.

2. That John W. Haussermann, upon whom summons was attemtped to be served, was not the managing agent of the defendant, Benguet Consolidated Mining Company, within the meaning of the Ohio statute governing service of process on foreign corporations.

3. That the defendant, Benguet Consolidated Mining Company, was not doing business in Ohio in such a sense or in such manner as to authorize a valid service of summons upon it under the laws of the state of Ohio; and that

it had no business within Ohio requiring an agent in Ohio to manage and conduct the same.

4. That no general appearance has been entered in this cause by the Benguet Consolidated Mining Company.

It is, therefore, ordered, adjudged and decreed that the purported service of summons and of alias summons, and the sheriff's return thereof upon the Benguet Consolidated Mining Company, be and the same are hereby vacated and set aside and held for naught, to all of which plaintiff excepts.

[fol. 15] IN COURT OF COMMON PLEAS

[Title omitted]

PETITION—Filed April 7, 1947

Now comes the plaintiff, Idonah Slade Perkins, and for her cause of action states that the defendant, Benguet Consolidated Mining Company, is a business association existing and doing business as a sociedad anonima under and by virtue of the laws of the Philippine Islands, and having its principal place of business in the city of Manila, Philippine Islands; that said defendant is engaged in the business of conducting mining operations upon certain properties in the Philippine Islands, extracting therefrom [fol. 16] gold and silver and marketing same in the United States and throughout the world; and that said defendant has issued and outstanding capital stock, evidenced by certificates for twelve million (12,000,000) shares, owned in part by citizens of the United States and in part by aliens.

Plaintiff further states that the defendant, John W. Haussermann, is the president and general manager of the said Benguet Consolidated Mining Company; that the said defendant is the controlling member of the business association known as Benguet Consolidated Mining Company; that the said defendant directly controls the operation, policies and management of the said Benguet Consolidated Mining Company; that the said defendant is the duly authorized representative of the said Benguet Consolidated Mining Company in the United States and designated by said business association with the Securities Exchange Commission

of the United States as the parent of said business association; that the said defendant is doing business in the state of Ohio for and as the Benguet Consolidated Mining Company; that the said defendant is a resident of the county of Clermont, state of Ohio.

Plaintiff further states that the defendant, First National Bank of Cincinnati, Ohio, is a national banking corporation, organized and existing under the laws of the United States; that the defendant, Benguet Consolidated Mining Company, is the owner of certain moneys and funds believed by this plaintiff to be on deposit in said defendant, First National Bank of Cincinnati, Ohio, in the name of John W. Haussermann, President No. 1, and in the name of [fol. 17] John W. Haussermann, President No. 2.

Plaintiff further states that the New Richmond National Bank is a national banking corporation organized and existing under the laws of the United States; that the defendant, Benguet Consolidated Mining Company, is the owner of certain moneys and funds believed by this plaintiff to be on deposit in said defendant, New Richmond National Bank, in the name of John W. Haussermann, President No. 1 and in the name of John W. Haussermann, President No. 2.

Plaintiff further states that on the first (1st) day of January, 1930, she was, ever since has been, and now is the owner of twenty-four thousand (24,000) shares of the capital stock of the said defendant, Benguet Consolidated Mining Company, evidenced by the following certificates theretofore issued by said defendant business association to and in the name of this plaintiff, representing the following shares of its capital stock:

Certificate Number	Date	Shares
1484	December 5, 1919	5,000
1595	August 19, 1920	2,888
2176	October 18, 1923	7,888
2238	December 26, 1923	224
2773	May 31, 1927	1,500
2780	June 8, 1927	6,000
2781	June 8, 1927	500
Total		24,000

[fol. 18] Plaintiff further states that on September 11, 1934, while said plaintiff was the owner of said twenty-four thousand (24,000) shares of the capital stock of said defendant business association as aforesaid, said defendent Benguet Consolidated Mining Company, declared a two hundred (200%) percent stock dividend upon its then issued and outstanding stock, viz., two (2) shares of its capital stock for each share of its capital stock then owned by each of its stockholders; that, pursuant to said declaration, during the year, 1934, the said defendant, Benguet Consolidated Mining Company, issued all of its capital stock so declared as said stock dividend and delivered to all of its stockholders, excepting this plaintiff, certificates representing shares of its capital stock so declared as said stock dividend; that said defendant, Benguet Consolidated Mining Company, has not issued in the name or delivered to the plaintiff a certificate or certificates representing forty-eight thousand (48,000) shares of its capital stock, being that portion of said stock dividend to which plaintiff was and is entitled.

Plaintiff further states that on or about November 22, 1939, while plaintiff was the owner of said seventy-two thousand (72,000) shares of capital stock of defendant business association as aforesaid, said defendant, Benguet Consolidated Mining Company, declared a one hundred (100%) percent stock dividend upon its then issued and outstanding capital stock, viz., one (1) share of its capital stock for each share of its capital stock then issued and owned by each of its stockholders; that despite the fact that said stock dividend has been declared and that all stockholders, excepting this plaintiff, have received their share [fol. 19] of said stock dividends, defendant business association has failed and refused to issue or deliver to plaintiff her share of said stock dividends, to wit: the seventy-two thousand (72,000) additional shares or any part thereof.

Plaintiff further states that she has made numerous demands upon defendants, Benguet Consolidated Mining Company and John W. Haussermann, but that said defendants have, without any cause, justification or excuse, wrongfully refused and failed to transfer, issue or deliver certificates of ownership for said additional one hundred and twenty thousand (120,000) shares to this plaintiff.

Plaintiff further states that the defendants, Benguet

Consolidated Mining Company and John W. Haussermann, have compelled this plaintiff to institute various and sundry legal actions throughout the United States against them and others, at great expense and hardship to herself, in an effort to obtain the cash dividends paid by the said defendants, Benguet Consolidated Mining Company and John W. Haussermann, to the owners and holders of their said stock; that, although the Court of Appeals of New York, the highest court of said state, in May of 1937, decreed that the plaintiff was the true and lawful owner, not only of the said original twenty-four thousand (24,000) shares, but also of the said additional one hundred and twenty thousand (120,000) shares declared as stock dividends on said original twenty-four thousand (24,000) shares, as well as all cash dividends paid by said defendants on all of said shares, and that any findings in the courts of the Philippine Islands to [fol. 20] the contrary were void because of fraud and lack of jurisdiction, nevertheless, the defendants, Benguet Consolidated Mining Company and John W. Haussermann, continued to thwart and obstruct the efforts of this plaintiff to obtain said additional one hundred and twenty thousand (120,000) shares and the cash dividends payable by said business association on all of the said shares of this plaintiff, and wrongfully refused to issue, transfer or deliver certificates of ownership for said shares to this plaintiff, or pay to her the cash dividends declared and payable thereon.

Plaintiff further states that subsequent to the said decree of the said Court of Appeals of New York, this plaintiff was compelled by the defendants, Benguet Consolidated Mining Company and John W. Haussermann, to file an attachment action in the courts of the state of California, in order to obtain service on said defendant, Benguet Consolidated Mining Company, and in order to enforce payment of said cash dividends declared and payable by the said defendants on all of said one hundred and forty-four thousand (144,000) shares owned by this plaintiff; that the said courts of the state of California also decreed, over the objections of said defendants, that the plaintiff was the true and lawful owner of all of the aforesaid one hundred and forty-four thousand (144,000) shares of stock, and the cash dividends declared and payable thereon, and awarded this plaintiff

judgment for said cash dividends in December of 1942, to the extent of the property of the defendant, Benguet Consolidated Mining Company, attached by this plaintiff in the state of California; that, despite the foregoing decision of the courts of the state of California, the defendants again [fol. 21] wrongfully refused to issue, transfer or deliver certificates of ownership for said shares to this plaintiff, or pay to her cash dividends thereon declared and payable after said judgment; that, subsequent to said judgment of the courts of California, the said defendants again compelled this plaintiff to file a second attachment action for cash dividends declared and payable subsequent to the former judgment, and that again the court rendered judgment in October of 1945, for the plaintiff, which judgment the defendants have wrongfully refused to pay; and that the Supreme Court of the United States denied certiorari to the said defendant, Benguet Consolidated Mining Company, from the Supreme Court of California.

Plaintiff further states that all of the foregoing has compelled this plaintiff to file an action in this court and in the Court of Common Pleas of Hamilton county, Ohio, against said defendants in an effort to obtain payment of said unpaid cash dividends due and owing to her, and to compel the issuance to this plaintiff by said defendants of certificates of ownership for the said additional one hundred and twenty thousand (120,000) shares of stock, her ownership of which has been confirmed and decreed by the highest courts of the states of New York and California.

Plaintiff further states that said defendants have wrongfully and maliciously used every means and device to prevent this plaintiff from obtaining cash dividends to which she was and is entitled and certificates of ownership for the share dividends to which she was and is entitled; that said wrongful and malicious acts of the said defendants in refusing to issue said certificates of ownership for the said shares [fol. 22] and in failing to comply with their contractual obligation to this plaintiff, as the true and lawful owner of said shares, to issue said certificates to this plaintiff, have caused this plaintiff to suffer damages and financial loss, in that, at a time prior to the first California judgment, this plaintiff was destitute and wholly without funds and was the recipient of charitable relief in the state of New York, at

which time this plaintiff received offers and could have sold all of her aforesaid shares of stock at prices not less than nineteen and 00/100 ($19.00) dollars per share and not more than twenty-five and 00/100 ($25.00) dollars per share; that plaintiff was unable to accept said offers or sell said shares of stock because of the wrongful and malicious refusal of the said defendants to issue, transfer and deliver to this plaintiff certificates of ownership for said shares; that the market value of said shares at date of this action has depreciated to the price of approximately three and 00/100 ($3.00) dollars per share; that the plaintiff has expended large sums for attorney fees, traveling and other expenses, increased tax liabilities, all to her damage in the sum of two million five hundred thousand and 00/100 ($2,500,000.00) dollars.

Wherefore, plaintiff prays judgment against the defendants, Benguet Consolidated Mining Company and John W. Haussermann, for the sum of two million five hundred thousand ($2,500,900.00) dollars; for an order of attachment to issue against all funds, moneys and property of the defendant, Benguet Consolidated Mining Company, in the possession of or under the control of the defendants, New Rich-
[fol. 23] mond National Bank and First National Bank of Cincinnati, Ohio; and for her costs herein expended.

Cors, Scherer & Hair, Attorneys for Plaintiff.

IN COURT OF COMMON PLEAS

SUMMONS

The State of Ohio, Clermont County.—To the sheriff of said county:

You are hereby commanded to notify The First National Bank of New Richmond, Ohio, Benguet Consolidated Mining Company, John W. Haussermann, president, New Richmond, Ohio, and John W. Haussermann, parent, president, general manager, New Richmond, Ohio, that they have been sued by Idonah Slade Perkins in the Court of Common Pleas of said Clermont county, and must answer by the tenth day of May, A. D. 1947, or the petition of said plaintiff will be taken as true and judgment rendered accordingly.

Said sheriff will make due return of this summons on the twenty-first day of April, 1947.

Witness my hand and seal of said court, this eighth day of April, 1947.

Lee Hannah, Clerk, by Ralph A. Parker, Deputy.

SHERIFF'S RETURN

The State of Ohio, Clermont County.

Received this writ April 8, 1947, at 9:30 o'clock a. m. And on April 8, 1947, I served the within named C. L. Meeker, cashier of The First National Bank of New Richmond, Ohio, John W. Haussermann, president of Benguet Consolidated [fol. 24] Mining Com., and John W. Haussermann, parent, president and general manager, by personally handing to each of them a true and certified copy thereof with all the endorsements thereon.

Clyde Dericks, Sheriff, by Marvin Bissantz, Deputy.

IN COURT OF COMMON PLEAS

MOTION TO QUASH AND SET ASIDE SERVICE OF SUMMONS AND RETURN OF SHERIFF—Filed May 2, 1947

Comes now the defendant, Benguet Consolidated Mining Company, and appearing specially for the purposes of this motion only and disclaiming any intention of entering other than a special appearance for the purposes of this motion, hereby moves the court for an order quashing and setting aside the attempted service of summons heretofore issued against this defendant, and for an order quashing and setting aside the return of said attempted service.

Lucien H. Mercier, Nichols, Speidel & Nichols, Ely, White & Davidson, Attorneys for Benguet Consolidated Mining Company.

IN COURT OF COMMON PLEAS

ALIAS SUMMONS

The State of Ohio, Clermont County.—To the sheriff of Clermont county:

Again you are hereby commanded to notify John W. Haussermann, New Richmond, Ohio, by serving a copy of the summons on John W. Haussermann, and also the Benguet Consolidated Mining Co., by serving a copy of the [fol. 25] summons on John W. Haussermann, president, general manager, controlling member and duly authorized representative and agent of said company in the United States and state of Ohio, returnable according to law, that they have been sued by Idonah Slade Perkins in the Court of Common Pleas of said Clermont county, and must answer by the thirty-first day of May, A. D. 1947, or the petition of said plaintiff will be taken as true, and judgment rendered accordingly.

Said sheriff will make due return of this summons on the twelfth day of May, 1947.

Witness my hand and the seal of said court, this second day of May, 1947.

Lee Hannah, Clerk, by Ralph A. Parker, Deputy.

SHERIFF'S RETURN

The State of Ohio, Clermont County.

Received this writ May 2, 1947, at 11 o'clock a. m. And on May 2, 1947, I served the within named John W. Haussermann by serving a copy of summons upon him personally, and also Benguet Consolidated Mining Company, by serving a copy of the summons on John W. Haussermann personally, president, general manager, controlling member and duly authorized representative and agent in the United States and state of Ohio, by personally handing to each of them a true and certified copy thereof with all the endorsements thereon.

Clyde Dericks, Sheriff, by Frank Hutchinson, Deputy.

[fol. 26] IN COURT OF COMMON PLEAS

MOTION TO QUASH AND SET ASIDE SERVICE OF ALIAS SUMMONS AND RETURN OF SHERIFF—Filed May 6, 1947

Comes now the defendant, Benguet Consolidated Mining Company, and appearing specially for the purpose of this motion only and disclaiming any intention of entering other than a special appearance for the purposes of this motion, hereby moves the court for an order quashing and setting aside the attempted service of alias summons heretofore issued against this defendant, and for an order quashing and setting aside the return of said attempted service.

Lucien H. Mercier, Nichols, Speidel & Nichols, Ely, White & Davidson, Attorneys for Benguet Consolidated Mining Company.

IN COURT OF COMMON PLEAS

STIPULATION—Filed September 20, 1948

It is stipulated and agreed by and between counsel for the plaintiff, Idonah Slade Perkins, and counsel for the defendant, Benguet Consolidated Mining Company, as follows:

1. That this stipulation shall in no wise constitute an entry of appearance in this cause by the defendant, Benguet Consolidated Mining Company, and that this stipulation is entered into only and specially for the purposes of the motion of the defendant to quash service of summons in this cause.

[fol. 27] 2. That the testimony, exhibits, briefs and arguments of counsel, introduced in the Court of Common Pleas of Hamilton county, Ohio, in Case No. A-103968, being styled, "Idonah Slade Perkins, plaintiff, vs. First National Bank of Cincinnati, et al., defendants", by both plaintiff and this defendant, in support of and opposing the motion to quash service of summons filed by this defendant in said cause, and the record of said cause to the date of this stipulation; are hereby introduced in this cause so as to constitute, together with such additional evidence, exhibits, briefs and arguments, as either party may offer, the entire

record, evidence, exhibits, briefs and arguments in support of and in opposition to the motion to quash service of summons filed by the defendant, Benguet Consolidated Mining Company, in this cause.

Cors, Scherer & Hair, By Gordon H. Scherer, Attorneys for Plaintiff, Charles G. White, Attorney for Defendant, Benguet Consolidated Mining Company.

[fol. 28] IN COURT OF COMMON PLEAS

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

1947, April 8. Petition filed.

1947, April 8. Affidavit filed.

1947, April 8. Praecipe filed.

1947, April 8. Summons issued to sheriff of Hamilton county Ohio.

1947, April 8. Order of attachment issued to sheriff, Hamilton county, Ohio.

1947, April 8. Praecipe filed.

1947, April 8. Summons issued to sheriff, Clermont county, Ohio.

1947. April 8. Order of attachment issued, sheriff, Clermont county, Ohio.

1947, April 9. Summons returned and filed, sheriff, Clermont county, Ohio.

1947, April 9. Order of attachment returned and filed, sheriff, Clermont county, Ohio.

1947, April 11. Summons returned and filed, sheriff, Hamilton county, Ohio.

1947, April 11. Order of attachment returned and filed, sheriff, Hamilton county, Ohio.

1947, May 2. Praecipe filed.

1947, May 2. Alias summons issued, sheriff, Clermont county, Ohio.

1947, May 2. Demurrer of defendant New Richmond National Bank filed.

1947, May 2. Demurrer of defendant First National Bank of Cincinnati filed.

[fol. 29] 1947, May 2. Motion of Benguet Consolidated

Mining Company to quash service of summons and attached memorandum and affidavit filed.

1947, May 2. Motion of John W. Hauserman requesting additional time to plead filed.

1947, May 3. Alias summons returned and filed, sheriff, Clermont county, Ohio.

1947, May 6. Motion to quash and set aside service of alias summons and return of sheriff filed.

1948, September 23. Stipulation filed.

1948, November 16. Opinion filed.

1948, December 3. Praecipe filed.

1948, December 3. Order to serve notice on garnishee issued, sheriff, Clermont county, Ohio.

1948, December 3. Order to serve notice on garnishee issued, sheriff, Hamilton county, Ohio.

1948, December 3. Motion to strike from petition and to make definite and certain filed.

1948, December 4. Entry sustaining motions to quash service filed.

1948, December 8. Notice returned and filed, sheriff, Clermont county, Ohio.

1948, December 11. Motion to strike from files, vacate and set aside the notice to appear of December 4, 1948, filed.

1948, December 11. Motion to strike from files, vacate and set aside the notice to appear of December 4, 1948, filed.

1948, December 14. Notice returned and filed, sheriff of Hamilton county, Ohio.

1948, December 15. Notice of appeal filed.

1948, December 15. Praecipe filed.

[fol. 30] 1948, December 21. Transcript from the docket of Common Pleas Court filed.

1948, December 22. Entry filed.

1948, December 22. Bond filed.

1948, December 30. Bill of exceptions filed.

1949, January 13. Application for continuance of hearing on motion to strike filed.

1949, February 18. Entry sustaining demurrer filed.

1949, May 27. Bill of exceptions refiled, Court of Appeals.

1949, July 8. Entry sustaining motion to strike from files, vacate, and set aside notice filed.

1949, July 8. Entry sustaining motion to strike from files, vacate, and set aside notice filed.

1949, July 13. Notice of appeal and praecipe for transcript filed.

1949, July 13. Transcript from the docket of the Common Pleas court refiled.

ORDER VACATING AND SETTING ASIDE PURPORTED SERVICE OF SUMMONS AND ALIAS SUMMONS

December 4, 1948. This cause having heretofore been submitted to this court upon the motions of the defendant, Benguet Consolidated Mining Company, filed under a special appearance, to quash and set aside service of original and alias summons on the ground that in its organization it is the American equivalent of a foreign corporation, and that it was not doing business in Ohio at the time of the service of summons, the court, upon due consideration of said motions, of the evidence before it, the oral and written arguments of counsel for plaintiff and defendant, Benguet Consolidated Mining Company, and the law on the subject, finds:

1. That the defendant, Benguet Consolidated Mining Company, which was organized under the laws of the [fol. 31] Philippine Islands as a sociedad anonima, is to be deemed a foreign corporation within the meaning of the laws of Ohio governing service of summons.

2. That John W. Haussermann, upon whom summons was attempted to be served, was not the managing agent of the defendant, Benguet Consolidated Mining Company, within the meaning of the Ohio statute governing service of process on foreign corporations.

3. That the defendant, Benguet Consolidated Mining Company, was not doing business in Ohio in such a sense or in such manner as to authorize a valid service of summons upon it under the laws of the state of Ohio; and that it had no business within Ohio requiring an agent in Ohio to manage and conduct the same.

4. That no general appearance has been entered in this cause by the Benguet Consolidated Mining Company.

It is, therefore, ordered, adjudged and decreed that the purported service of summons and of alias summons, and

the sheriff's return thereof upon the Benguet Consolidated Mining Company, be and the same are hereby vacated and set aside and held for naught, to all of which plaintiff excepts.

[fol. 32]. In Court of Common Pleas

Bill of Exceptions—Filed December 30, 1948

Be it remembered, that on the trial of this cause in the Court of Common Pleas of Clermont county, Ohio, before the Honorable Harry Britton, judge of said court, at the April Term, 1948, thereof, to wit; on the twentieth of September, 1948, the following evidence was introduced:

Colloquy

By the Court: As I understand it, gentlemen, this—the two cases are to be heard at the same time, is that the understanding?

Mr. Scheer: That's correct.

By the court: You have the original papers, I take it. Are the parties ready?

Mr. Nichols: We are, if your Honor please. I would like to present Mr. Lucien Mercier of Washington, D. C., and Judge F. C. Fisher of the Supreme Court of the Phillippines and now of the California bar.

Statement by Mr. Mercier

If it please the court, these two cases this morning are on motions for service on behalf of the Benguet Consolidated Mining Company. It has been stipulated between the parties that the testimony offered on the motion for service on another case filed by this plaintiff in Hamilton county, as well as all the exhibits, and that in Hamilton county, should be repeated by your Honor on this motion as well as in evidence for the purpose of facilitating the file in this case.

Now, we have all of the exhibits here and I imagine what we will do is refer to them as we argue the case, if that is suitable to your Honor.

[fol. 33] By the Court: You may refer to the exhibits—that is, in the first case in Cincinnati, and they may be numbered or lettered the same in this case as they were in Cincinnati, and I think that will help you gentlemen a little in the future unless you have a better idea than that, of course.

Mr. Scherer: I think that's a good suggestion. Perhaps you want us to read the stipulation in full.

By the Court: I haven't had time to read it up until now.

Mr. Scherer: Perhaps your Honor will want to read it.

By the Court: It's all right, gentlemen.

Mr. Scherer: Do I understand that both stipulations will be entered as part of the record in this case?

Mr. Mercier: One in each case.

By the Court: Will the marking of the exhibits in the same manner be satisfactory to both counsel?

Mr. Mercier: Yes. I think it is a very excellent suggestion.

By the Court: You may proceed. You will have to talk a little loud, gentlemen. It's almost impossible to hear in this room.

Mr. Mercier: I'll try to speak loud enough so that the court may hear.

Mr. Mercier: These two actions, if your Honor please, have been brought by a nonresident of the state of Ohio. We are jubilizing the Ohio courts to try to enforce alleged demands against the defendant. The plaintiff was a nonresident of Ohio in pro of the actions which also do not arise in the state of Ohio, then because of actions having arisen in the Philippine Islands.

[fol. 34] This litigation here is the outgrowth of marital difficulties between the plaintiff and her husband. The plaintiff and her husband were married in the Philippine Islands in 1914 and lived there as husband and wife until 1930. In 1930 they separated and she lived in the Philippines until 1933, and the husband still lived in the Philippine Islands. In the Philippine Islands they have what is called a connubial property system of law, identical with the community property system of law in effect here in fifteen states including California, Texas, and some of our western states.

During the marriage between these two parties, there was a quarrel. 24,000 shares of the Benguet Consolidated Mining Company, which, under the Philippine community property system of law, would be community property. That 24,000 shares was among a great many other items of personal property acquired by these two parties during their marriage. In 1930 these parties—the plaintiff and her husband—separated and then began a court battle which has been lasting since 1930 through this day, the plaintiff having filed a multitude of suits. Most of the suits had to do with this 24,000 shares of stock on which her claims in these two suits are based.

In 1930, in the first action that the plaintiff filed against her husband, she alleged that the 24,000 shares of stock on which she bases her claims here, were the property of a connubial partnership that existed between herself and her husband. In the Philippine Islands, when the husband and wife divide property during marriage that property is supposed to be owned not by the husband and the wife, but by the connubial partnership that exists between the hus- [fol. 35] band and the wife. The law in the Philippine Islands makes the husband the administrator of that connubial partnership and as such administrator, under the law of the Philippines, he is entitled to the possession and control of any and all personal property which is acquired during marriage. As I say, in the first action against her husband, the wife alleged that 24,000 shares of stock were community property. On the basis of that contention, the Philippine Islands aided the jurisdiction of it—the 24,000 shares were there awarded the possession and control of the 24,000 shares to the husband. The wife refused to surrender them. As a matter of fact, she sent the certificates, representing those 24,000 shares, to New York. After the husband had been awarded the custody and control of that stock in the Philippines, he went to New York—the husband did—and filed suit against Benguet Consolidated Mining Company, the suit to which Mrs. Perkins had sent those 24,000 shares in replevin to represent certificates to represent these shares. In that suit the wife introduced testimony showing that the 24,000 shares of stock were not the property of the connubial partnership because those 24,000 shares of stock were purchased out of property that she

had brought to the marriage. Now, in that suit the husband made—offered no testimony or contradiction to her testimony to the effect she had purchased those 24,000 shares out of her own profit. That suit resulted in a judgment against the husband for the amount of the dividends declared out of that 24,000 shares which aggregated, at that time, about $194,000.00. That judgment was finally made final in May, or in the latter part, rather, of 1937. The plaintiff, rather than proceed against her husband in the [fol. 36] Philippine Islands to enforce that judgment, then went to the California courts in which state the Benguet Consolidated Mining Company had allowed deposits from the sale of its gold to the United States Mint in San Francisco, and filed suit by way of attachment against the wife alleging the Benguet Mining Company to be a corporation in order that she might sustain her attachment against its funds there in California. The California court, having attached that property, there was nothing for Benguet to do but enter a general appearance in that case, which the Benguet did. Benguet endeavored to show to the court that her testimony in that New York action was absolutely contrary to any normal facts as to her having 24,000 shares, out of the shares he'd brought to the marriage, but the California court refused to let us introduce any testimony whatsoever and held us bound by the judgment in the New York court although we were not a party to that New York action. That California case, as I say, was filed in January of 1938—January, 1938, after she had gotten her judgment in New York.

In the latter part of 1938, Mr. Perkins, the plaintiff's husband, in the Philippine Islands, filed a suit against the Benguet Mining Company for dividends. When the New York judgment was rendered—when we were first notified of it, and before it became final in May of 1937, we refused to pay the dividends on this 24,000 shares of stock to anybody until the matter had been determined by a court of competent jurisdiction. Prior to that time, in January and through May of 1937, Benguet had paid those dividends to Mr. Perkins as administrator of the partnership property [fol. 37] by checks payable to Mr. Perkins which Mr. Perkins received and which he had a right to receive under Philippine law. In 1937 Benguet stopped paying dividends

on that stock and in 1938, in August or September, the husband filed a suit against Benguet in the Philippine Islands claiming those dividends saying they were unlawfully holding dividends from him. Benguet came in and said Mrs. Perkins already had a judgment—she is an interested party, the court in New York said—she owned this stock, so she should make a party defendant. The court made her a party defendant and so Mr. Perkins filed an amended complaint in which he brought in Mrs. Perkins as party defendant. The basis of that complaint being that the action was one—was—yes, rather, that the land was there in the Philippine Islands and that the court had a right to bring in, by publication, any party that claimed an interest in that land which is the same we have in Ohio. Mrs. Perkins was sued by publication and came in in the Philippines and on the—and in action—action in bill as soon as the number and person we have had to be had on her. The court overruled that contention and that went to the Supreme Court of the Philippines and they affirmed the lower court saying the law in the Philippines would be party defendant by publication. Thereupon, Mrs. Perkins entered an appearance in the Philippine Islands—a general appearance—and in that case filed repeated and multitudinous complaints and cross complaints demanding against her husband the dividends, demanding a judgment against Benguet for dividends in addition to which in that Philippine suit Mrs. Perkins also made identical claims against the Benguet Mining Company that I found pending in [fol. 38] these suits before your Honor today. That suit in the Philippine Islands was decided in April of last year contrary to the contentions of Mrs. Perkins; awarded Mr. Perkins the dividends from 1937 and thereafter, and dismissed the cross complaints of Mrs. Perkins against Benguet.

Now—so much for the history of the cases—

The issue before your Honor—the issues, rather, before your Honor today are two. The first issue is whether the Benguet is an entity separate and distinct from the members who compose it. That is, its stockholders.

The second question is—if it be an entity, the first question brings up a proposition that Benguet is an entity and we—that Benguet must be served as though it were a for-

eign corporation. The contention is that Benguet is a partnership and that Benguet may be served as you serve any other partnership. The second contention is they say that if we do concede that Benguet is a foreign corporation, under the statutes of Ohio, with respect to foreign corporations, then our service of summons on Judge Haussermann as president of Benguet is valid because Benguet was doing business in the state of Ohio.

Now, these same two issues were argued out before Judge Bell in Hamilton county in a third suit filed by Mrs. Perkins against the Benguet Mining Company. Judge Bell rendered his decision to the effect that Benguet was a partnership and that it could be sued as though it were a partnership, and that the major portion of his decision is to show that Benguet is a partnership. Judge Bell goes on to say that if it be conceded, however, that Benguet is a corpora- [fol. 39] tion—a foreign corporation—and must be served with summons, as though it were a foreign corporation, then the fact is, so he states—Judge Bell—that Benguet was doing business in the state of Ohio and then accordingly that service on John W. Haussermann as president and general manager was service on it—an agent—was service as by Ohio General Code.

These are the two issues before your Honor this morning, and we propose to show by witnesses' testimony and then by our argument on the testimony in the case that Judge Bell was wrong in every respect.

Thank you, your Honor.

STATEMENT BY MR. GORDON SCHERER

If the court pleases—gentlemen—Mr. Mercier gave to your Honor a brief statement of the history of the previous litigation between these two parties. Perhaps it would assist your Honor—I might say this—it is a statement that might well be made if this case was being tried on its merits. The previous litigation, in my mind, has nothing whatsoever to do with the sole question before your Honor this morning; namely, whether there is a valid service on the defendant in this case which arises on the motion to quash while much Mr. Mercier has said with reference to the previous litigation is true, nevertheless it was not a

complete statement, and if your Honor is interested, as we pointed out to Judge Bell, there are two cases in the United States which review that litigation completely and exhaustively and that is Perkins v. Guarantee Trust Company of New York decided in the Court of Appeals of New York, reported in 8 Northeastern, Second Edition, 849; Second [fol. 40] New York, 274, page 250; and the other is the California case to which Mr. Mercier refers—Perkins v. Benguet Mining Company, reported in 55 California Appeals, Section 720.

Of course, our interests deny the Supreme Court of the United States in that case, but as Mr. Mercier stated in the latter part of his opening statement to your Honor and as I have stated, we have valid service. As we contend here, and as we contended in the Common Pleas of Hamilton county, where the identical question was laid, it is our contention that the Benguet Mining Company is a business organized in the Philippine Islands known as a sociedad anonima. It was organized under the old Spanish code of commerce of Spain. In 1906—that was before 1906—the Benguet was organized under the old Spanish code of commerce of Spain. I believe it's 1906 or 1903 the Philippines adopted a corporation code; a corporation code that is similar—almost identical—with the Ohio corporation code that we have here in Ohio today. When that code was adopted, it gave sociedad anonima the opportunity to reorganize under that corporation or code to become a corporation or under certain conditions permitted them to continue it as such socieded anonima, or anonima partnership. Benguet elected to continue as a sociedad anonima. It is our contention that a sociedad anonima is the equivalent of an Ohio partnership association and that it therefore can be served in Ohio the same as you serve in Ohio as a partnership or partnership association in Ohio.

The sociedad anonima derives its authority from its articles of association of its members. It was never granted a charter, which is the essence of a corporation, by any au- [fol. 41] thority of the government such as a Philippine corporation are granted. You are granted a charter for the corporation in the state of Ohio. There is a subsidiary of Benguet known as the Balatoc Mining Company which is a Philippine corporation organized under the Philippine

code—present code—and it, in Ohio today, would be considered a foreign corporation.

Our position further is that even though your Honor should differ with us—differ with Judge Bell—and hold that it is the equivalent of an American or Ohio association—that is, the sociedad anonima—and therefore should be treated as such in Ohio when it comes to service of process on the foreign association, nevertheless, the overwhelming evidence both in the testimony that was taken before Judge Bell and the voluminous documentary evidence in this case would convince any court, beyond any peradventure of doubt, that if a time service of summons was made in these two cases on the defendant, they were doing business in Ohio sufficient—more than sufficient—to make amenable, service of process as a foreign corporation in Ohio. We do not admit it is a corporation, but on the alternative, if your Honor should say they are right in the equivalent of an Ohio section and entitled to be served under 11290 as a foreign corporation, then we say that they were doing business sufficient—more than sufficient—to make them amenable to process as far as a foreign corporation. That is the position we have taken and I believe if your Honor will read the testimony that took quite a few days in the Common Pleas Court, and just glance over these exhibits you will be convinced that we are right in this matter and properly before this court.

[fol. 42] Mr. Mercier: The first offer, if your Honor please, by way of testimony—evidence in this hearing—is between the counsel for plaintiff and defendant and that stipulation is to the effect among the many shareholders of Benguet Mining Company in Clermont county there are the following shareholders: Lucian H. Dawson of New Richmond, Ohio, S. L. Larkin of Batavia, Mrs. Charles Clasgens of New Richmond, Mrs. Marie Meyer of Milford and Mrs. Neil Buckley of New Richmond.

They are shareholders of Benguet Mining Company. That's the committee. We'd also like to introduce at this point—there is also—has this been introduced in evidence (to Mr. Scherer)?

Mr. Scherer: I believe in the previous case you introduced the original complaint and we followed with the introduction of the entire record.

Mr. Nichols: I believe not; only the entire answer.

Mr. Scherer: I have no objection.

Mr. Mercier: It is stipulated the entire record of the California record is before your Honor which consists of complaint filed by Mrs. Perkins and I believe four supplemental complaints in this first action, plus her affidavits in attachment, and the answer of the Benguet Consolidated Mining Company. In other words, all of the documents in here that have to do with the complaint filed by Mrs. Perkins and anything with regard to any answer filed by Benguet is stipulated to be in evidence.

Mr. Scherer: Let's follow the judge's suggestion and offer that as Exhibit 4. Did we want to offer them in order? [fol. 43] By the Court: Due to the fact the exhibits have already been marked, you gentlemen know them by the markings and we can learn them. In that way, we'll eliminate any additional exhibits.

Mr. Mercier: Now, Exhibit 4 will be introduced—is already in evidence—but of Exhibit 4 we introduce the additional supplemental complaints filed by Mrs. Perkins and any additional answer filed by Benguet, together with affidavits in attachment.

Mr. Scherer: That's agreeable.

Mr. Mercier: Now, we will call as a witness on behalf of the Benguet Mining Company, Judge Fred C. Fisher.

Whereupon, JUDGE FREDERICK C. FISHER, after being properly sworn, testified as follows:

Direct examination.

By Mr. Lucien Mercier:

Q. Would you give your full name, please, and your address?

A. Frederick Charles Fisher, 19 Wilmington Avenue, Ross (Mervine (?) county), California.

Q. And what is your occupation, or profession?

A. I am a lawyer.

Q. Are you a member of the bar of any of the states of the United States?

A. Yes. I am a member of the state of Ohio, and the state of California.

Q. Did you ever live in Ohio?

A. About 7 years, ending 1940.

Q. And what is your present occupation?

A. I am a lawyer.

Q. I mean—are you——

A. I am a member of the legal department of the Firestone Tire and Rubber Company; the Ohio office.

[fol. 44] Q. Did you ever live in the Philippine Islands, Judge Fisher?

A. I did.

Q. When did you first go to the Philippines?

A. In July; 1898.

Q. In what connection?

A. I was a member of the United States Army in the war against Spain, when they participated in the invasion.

Q. After the war was over, did you take over any other occupation other than the army in the Philippines?

A. After the fall of Manila, I was detailed in the office of special duty in the Spanish government because of my knowledge of Spanish and did interpretation for the commanding general and then General Arthur McArthur who became as well commanding general.

Q. You were the private secretary in the Spanish language for General McArthur?

A. After I was discharged from the army, I was appointed as General McArthur's secretary and performed the same service for him which I had before in the special enlisted army.

Q. That is the father of the present General McArthur?

A. Yes.

Q. Did there come a time when you took the bar examination in the Philippine Islands?

A. Pardon me?

Q. Did there come a time when you took the bar examination in the Philippine Islands?

A. Yes.

Q. Did you take that bar examination in the English or Spanish language?

A. I passed indeed the bar examination in the Spanish with that part subject to the law—the codes—and in Eng-

lish with respect to the procedure system, at that time was by civil procedures.

Q. After you left your occupation with General McArthur, what was your next employment in the Philippines?

[fol. 45] A. My occupation with General McArthur came to an end when civil government was organized in the Philippines and Mr. Taft became first civil governor. At that time a Supreme Court was organized in the Philippine Islands under legislation of the Taft commission and Mr. Taft appointed me clerk of that court.

Q. Now, you say a Supreme Court was organized. Was that under the laws of the United States?

A. It was organized under statute enacted by the Philippine commission which, at that time, exercised the legislative authority under delegated power of the president of the United States under war powers.

Q. Under possession of the United States?

A. President of the United States under military government.

Q. How long did you retain that position as clerk of the Supreme Court of the Philippines?

A. I think I should add, before I answer that question—upon the organization of the government of the Philippine Islands as a civil government pursuant to an act of Congress in 1902, it was determined the military phase of our sovereignty in the Philippines.

Q. How long were you a clerk of the court of the Philippines?

A. A little over 4 years.

Q. As such clerk, what were some of your duties?

A. Well, most of the work, which ordinarily pertains to a clerk, was done by my deputies. Because of my knowledge of Spanish, I have to interpret, orally, the arguments of counsel at the arguments of the bar because some of the Filipino members of the court didn't understand English and the American members didn't understand Spanish, and, of course under the law at that time—the Philippine system existed—and the court couldn't hear all the ad-

[fol. 46] dresses. Of course, the Filipino and Spanish addressed it in Spanish and I had a meeting between those members of the court that did not understand the English

as the address was being made: The same thing was true in the Spanish work of the court. The American justices couldn't speak directly to the Filipinos, and the Filipinos so that the discussions of the cases submitted were conducted through my intermediary as interpreter of the Spanish.

Q. Before that, you sat in the delegation of the Philippine Islands?

A. Yes. I was present at all the commissions.

Q. Now, the justices of the Supreme Court, who appointed those judges——

A. They were appointed by the president of the United States by and with the consent of the Senate, by the Philippine bill, and, of course, the later Jones Act passed in 1914.

Q. Any difference the way those judges were appointed and our federal justices of the Supreme Court?

A. None whatever.

Q. You became a judge of the Supreme Court of the Philippines?

A. I did. Many years later I was admitted to the bar and practiced there a long time.

Q. You were there by president of the United States?

A. By President Woodrow Wilson.

Q. And confirmed by the Senate?

A. And confirmed by the Senate. I think I should say during the time I was clerk of the court, I carried on my studies. I had studied law before but never admitted, so continued my studies and before admitted to the bar, I carried on my studies.

[fol. 47] Q. You resigned your position as clerk of the courts?

A. Yes, after I was admitted to the bar.

Q. Then you began practicing law after four years?

A. That's right.

Q. How long did you practice law in the Philippine Islands?

A. I practiced law in 1904, as I recollect, was the year, up until 1927 at which time I was a member of the Supreme Court.

Q. Of the Philippines?

A. Of the Philippines.

Q. Now, could you tell me whether the membership of

the Philippine Supreme Court was a majority Filipino or majority American?

A. During the American regime, up to the time it was established,—a Philippine commandant,—it was always majority American. The practice was for the president to appoint four Americans and three Filipinos with the chief justice a very distinguished Philippine lawyer. After the membership of the court increased to nine, the same proportions—five Americans and four Filipinos. After the establishment of the commandant government, all the Americans went off the court and all the justices were Filipinos appointed by the president of the Philippine commonwealth.

Q. What year was that? The Philippine commandant?

A. The commandant was established in 1935, I think, under law of 1935, or 1936, and continued until the end of the—of course, the interruption caused by the Spanish invasion.

Q. You say you terminated practicing law in 1927. What did you do after that?

A. I returned to the United States and for a few months I devoted time to writing a book on Philippine corporation law. After that I went to Washington and was appointed [fol. 48] by the state department special counsel for the United States to appear in cases which were being argued before an international claims commission set up by a treaty between the United States and Mexico dealing with claims of international law arising between the two countries.

Q. After that assignment, did you have any other asaignment in the United States?

A. Yes. The treaty expired, I think, three years after I commenced doing that work although they were not able to finish their work and not very long afterward they—an arbitration of a boundary dispute between the Republic of Honduras and Guatemala was submitted to arbitration between the two countries. Chief Justice Hughes was on the board and the lawyer from Puerto Rico. Chief Justice Hughes wanted someone to aid him in the work with the voluminous record and on the recommendation of the department of state, I acted as Mr. Hughes' assistant during

a period of a year and a quarter while working on that arbitration.

Q. Now, while you were a clerk of the Supreme Court of the Philippines, did the Supreme Court have any published volume of its decisions?

A. May I interrupt—to complete that last answer—after the termination of my work with Chief Justice Hughes, I joined where they had a litigation in Liberia, West Africa, and I went out for them and that resulted in permanent work with their firm.

Q. The decisions of the Supreme Court, while you were there, were they recorded?

A. Yes, they were.

Q. Did you have anything to do with the recording of those decisions?

A. The first volume was recorded by Mr. Charles C. [fol. 49] Hogue. I retired by law and by announcement the clerk is made—was reporter and while I was occupying the office of the Supreme Court, I also reported the decisions corresponding to that period.

Q. Have you ever written any books on Philippine law?

A. Yes.

Q. Before you answer that, can you tell us what system of law was in force in the Philippine Islands when the American forces came there in 1898?

A. Yes. The system of law was the modern European law based on Roman law and some years before our occupation, that law had been codified first, in the commercial matters in the Spanish code, or commission, and in the following year with respect to civil law other than commercial—with Spain—and both those codes, after adoption in Spain itself, were incorporated applicable to Spanish colonies, including the Philippine Islands, and those codes were the basis—that is, the civil and commercial and some other laws of Spanish basis, were the basis of the law of the Philippine Islands in transfer of sovereignty to the United States of America.

Q. Did your Honor say those codes are in effect?

A. They continued in effect first, under the principles of international law not being political in character, and then President McKinley's instructions in which he said to combine during the period required commercial govern-

ment legislature—he directed that civil laws, or law, non-political in character, continue in effect. Then when Congress entered in 1902, passed the first Philippine bill, there was a provision to effect a law, political in character, not [fol. 50] in—to our Constitution. After it continued in court so that those codes remain and still are to this day the basis of the law in civil law in the Philippine Islands. Of course, they were modified by statute in the course of forty odd years.

Q. Was there a court of civil procedure also adopted in the Philippine Islands?

A. There was a law of civil procedure—of Spanish procedure—in the Philippines when we went there. That covered the field in the exercise of its legislative authority—enacted a code of civil procedure. If I remember, it was either 1902 or 1903.

Q. Would it be 1901?

A. I don't remember the exact dates.

Q. I show you volume entitled Fisher's New Annotated Code of Civil Procedure. Is that the code to which you refer?

A. Yes, this is the code to which I refer and the act enclosed shows when this became effective—if I may refresh my memory—yes, it was in 1901.

Q. It was enacted in 1901?

A. Yes.

Q. At this point I should like to offer in evidence as Defendants' Exhibit 7 the code of civil procedure on the Philippine Islands as contained in Fisher's book entitled Fisher's Annotated Code of Civil Procedure published by The Lawyers Co-operative Publishing Company of Rochester, New York.

(Book marked as Defendants' Exhibit 7.)

Q. Now, that book bears the name of Fisher. Are you the author of that book?

A. I made the annotations. Yes, sir.

Q. You made the annotations to that code. Are there any other books on Philippine law that bear your name?

A. Yes. While I was still clerk of the Supreme Court of the Philippines, I published in Spanish a book containing [fol. 51] a brief treatise on Principles and Code-Treaties,

and also containing forms for judicial practice. Some years later, after the Filipinos began to use the English language, as well as Spanish, that book was republished in English. It has gone through successful editions up to and including one that came out this year.

Q. The new edition this year—did you revise that?

A. I did.

Q. And you say that book has come through several printings?

A. If I recall, the 1948 edition is the third edition in English and of course the fourth edition, including the original Spanish edition.

Q. Are there any other books on Spanish law which you have written or annotated?

A. A great many years, I put out—I translated—the civil code of Spain from Spanish to English—annotated it by references to decisions of the Supreme Court in the Philippines, interpreting the various articles that I told.

Q. And that book—has that been reprinted?

A. Yes. It's gone through five editions, the last one of which was put out by The Lawyers Co-operative Publishing Company early in 1948.

Q. And the revision of it for the reprinting this year—was that done by you?

A. All of the work was done by me. In revising it, I did a few minor changes in translation and of course completed the references up to the last available published decisions of the Philippine courts.

Q. Are there any other books on Philippine law which bear your name?

A. I think that's all. I can't recall them.

[fol. 52] Q. You mentioned a book on corporations?

A. I mentioned that earlier in my testimony. I said I had written that book after I returned from the Philippines. That was also published by The Lawyers Co-operative Publishing Company in 1930, I believe.

Q. Now, this Civil Code of the Philippines with Philippine notes by Fisher—is in evidence as Exhibit 7?

A. Yes.

Q. Could you tell us of what rights, duties, or obligations the civil code treats us as far as Spanish law is concerned?

A. Yes. It deals first, with personal relations and it deals with property in general, contract, inheritance, general substance called the body of civil law. Other than those specific—relating to commercial transactions.

Q. Now, besides this civil code you suggested awhile ago under the system in force on the Philippine Islands, there was also a code of commerce?

A. Yes.

Q. There has been introduced in evidence as Exhibit No. 2 a work called—as agreed to—on the code of commerce of Spain. Are you familiar with that code?

A. Of course I am much more familiar with Spanish than translation. I have seen the book; perhaps like every translator I would make a slight difference in translating.

Q. You are referring to a book that is in front of you?

A. This is a book I have had for forty odd years which contains the civil code, code of commerce law, and other important statutes of Spain including the codes of procedure of Spain.

Q. And those are the ones that were in force when the American force took over?

[fol. 53] A. With the exception this book contains the Spanish code of procedure which differs slightly from a code based on it, which was put in the Philippines at the time of our occupation there; substantially the same.

Q. The rules set out in these codes are still the rules of law in the Philippines today?

A. Except they have been modified by—first, by Philippine Assembly and they are now under a republic, of course.

Q. Now, you say you practiced law in the Philippine Islands from 1904 to 1927?

A. Yes.

Q. Did you practice law alone or were you associated with any other lawyers?

A. I have always practiced law in partnership; in a partnership form.

Q. Could you tell us the name of some of the partners —your partners there in the Philippines?

A. Yes. When I commenced practicing law, after I was admitted to the bar, I formed a partnership with Francisco Ortigas who had been practicing for some time and who had been my tutor and prepared me for the bar examination and

under whom I was —. Ortigas and I practiced together for a number of years and then he decided that he would like to accept an appointment to a code commission which had been set up by the Philippine commission for the purpose of advising the Philippine law. With that contingency confronting us, we opened negotiations with the firm of Haussermann and Cone and the result was the two firms were consolidated. Mr. John Haussermann was then a partner and Mr. John C. Cone joined Mr. Ortigas and myself. This firm was known as Haussermann, Cone, Ortigas and Fisher. About six months later, Ortigas dropped out and took up [fol. 54] duties in the code commission. Thereafter, Haussermann, Cone, and I continued to practice under the firm name of Haussermann, Cone and Fisher for a number of years. Then Mr. Haussermann dropped out of the firm.

Q. Do you remember just about what year you became associated with Judge Haussermann?

A. I think that Haussermann, Cone, Ortigas and Fisher —the firm was organized about 1910. I am not absolutely definite.

Q. 1910?

A. Yes. It must have been about that time.

Q. And when did Judge Haussermann drop out of that firm?

A. He dropped out, as I recall, about 1914, or 1915.

Q. And you never practiced law with Judge Haussermann thereafter?

A. No.

Q. And the Judge Haussermann to whom you are referring is the Judge Haussermann here today?

A. I am. He gave up the practice of law and engaged in other pursuits after he left our firm.

Q. Did you ever represent the Benguet Mining Company, the defendant in this case today?

A. Yes. We were their general counsel. That is, the firm of which I was a member—a general counsel of that firm after Mr. Haussermann became interested in it. Before that time, we had not been attorneys.

Q. How long would you say your firm represented the Benguet Consolidated Mining Company?

A. Well, it seems to me that it was about in 1914, or there-

abouts, until—1914 or '15—until 1927, as far as I am concerned.

Q. 1915 to 1927?

A. Yes.

Q. At which time you returned to the United States?

A. At which time I returned to the United States and my former practice and there continued to be attorney.

[fol. 55] Q. Could you tell us what kind of an organization the Benguet Company happened to be?

A. Yes. It was sociedad anonima organized under the code of commerce in Spain in force in the Philippines and registered in the Mercantile Registry in the city of Manila.

Q. I'll show you Exhibit No. 1 of the defendants.

A. Yes, I've seen that.

Q. Those are the articles of consolidation of the Benguet?

A. It's apparently photostatic of the original Spanish of the articles of the company.

Q. Showing the filing in the Mercantile Registry?

A. By the certificate of the officer; the officer in charge of the registry.

Q. Now, could you tell us under what sections of the code of commerce Benguet was organized?

A. Yes. It was organized under Section 151 of the code of commerce dealing with what are deemed, in the nomen nature, of anonymous companies.

Q. Is such a company organized under the code of commerce under that section? Is such an organization a civil partnership or a commercial company?

A. A company such as the Benguet Company is a commercial company.

Q. Would you refer to—is that covered by any section of the code of commerce?

A. Yes, it is.

Q. If you will——

A. I'll turn to that.

Q. Is it 123?

A. I am looking for the—yes, I think it's 123. I'll look at it. Yes, 123; it's 123.

Q. If you are—this is in Spanish, of course. It's on the desk, is it not?

A. Section 123 of the code of commerce of the Philippines deals with all forms of commercial organizations; what is

[fol. 56] known as collective companies, commandatory companies, and anonymous companies, and technicalities of their nominations, and Article 123 provides that commercial associations, including loans and banks of discount and particularly mining companies. I noticed that a spherular of this translation uses mining translations. I would say mining companies because the original which is, of course, the law rather than any translation, uses the expression code "companias de minas."

Q. And that means mining companies?

A. That means mining companies. Yes. And the other companies is used all through that article.

Q. Now, would you refer to Article 122 of the code of commerce?

A. Yes.

Q. Would you tell us what the provisions of Article 122 of the code of commerce provides, or are?

A. Article 122 illustrates the three authorized forms of commerce or mercantile companies; under the law, that is the regular general collective company—the limited company—an anonymous company in which the interests of the partners are represented by charter or associates.

Q. Now, under which form was adopted by Benguet in your organization?

A. The anonymous form authorized by paragraph 3 of Article 122.

Q. Now, in your translation of the original code of commerce, is that designated as a partnership association or as a company?

A. The translator, I think, correctly refers to the three forms in general as commercial associations, although the original is mercantile companies in Spanish. The word "companies" he translates it associations and then in his translation of the third paragraph of Article 122 he uses [fol. 57] the word "corporation" to designate the anonymous company.

Q. So that "espiritu" designates the third type of organization as a corporation?

A. Uses the word "corporation" as the equivalent of anonymous society.

Q. And that was the section under which Benguet was organized?

A. That was the section under which Benguet was organized. It had to be because of the nature of the business in which it was engaged. At that time—I was going to say at the time of the organization of Benguet there was no other law under which a stock company could be organized in the Philippines.

Q. Do you know of any other translators or words that contained "compañias de minas" such as Benguet is a corporation?

A. Frankly, I don't recall because, of course, I have always used the original Spanish text and haven't paid much attention to the translations in English.

Q. Does the Supreme Court, in its decision, call it a corporation?

A. The Supreme Court has often used the word "corporation" to designate the various companies organized under the code of commerce and, at times, under the civil code.

Q. Are you familiar with the official translation made by the United States of the Philippine code of commerce?

A. I've seen it. Yes.

Q. And the definition there also is a corporation, isn't it?

A. Frankly, I don't recall. As I say, I had no occasion at all to use that translation.

Q. And you say you are the author of a book called "The Philippine Corporation Law"?

A. I think The Philippine Law Stock Corporation is the [fol. 58] name I gave the book.

Q. When was the Philippine law on stock corporation passed?

A. I think it was in 1906.

Q. And prior to that time, was there any organization at all that could be organized under the code of commerce that was, in any wise, similar to the Philippine corporation law?

A. The only organization providing for the representation of the interests of the owners by charter was this article—these articles of the code of commerce.

Q. And what articles?

A. This is the article 12—151.

Q. 151?

A. 151. And then, of course, shares could be represented

—to represent the interests of the partners, so-called, in the commandatory form of mercantile company.

Q. Let's limit ourselves to an organization that's similar to a corporation under the Philippine corporation code. That would be——

A. There was a similarity to the extent that the interests of the parties were partly represented by shares. That's why I mentioned that.

Q. Is there any difference between sociedad anonima, organized under Section 3 of Article 122, and Section 151 of the code of commerce, and a corporation organized under the Philippine corporation law?

A. I have never been able to persuade myself that there is any substantial difference. There, of course, are a few minor differences. Corporation law requires a definite time for existence of a company, wherein, corporation law requires that articles be determined, but no limits on the—its parties may adopt. The corporation law determines the [fol. 59] kind of shares to be issued. The code of commerce simply provides shares be issued to some definite person; nominative shares, or without name, and are shares to the bearer. Those are the nature of the differences between the two statutes. Then after that, the corporation law, passed in 1906, is still in force out there, provides that after the articles of corporation have been filed with the proper officer, sometime in what he offers a certificate of corporation, whereas, under the code of commerce, all that is necessary was the execution of the articles in the corporation of the anonymous society by the person desiring to form it, before a notary public. The law requires a public instant, which means acknowledged before a notary public, and then it had to be presented for registration in the Mercantile Registry. It was the act of administration gave the company its status as a legal entity.

Q. Well, now by following the provisions of Section 151 of the code of commerce, would you say that those—the following of those provisions would be sufficient to constitute a provision under the Philippine corporation law? If the form——

A. Substantially, except under the corporation law—except without filing your articles of corporation in the

Mercantile Registry, you present them to the officer in charge of the Bureau of Registrations.

Q. That would be the only difference?

A. That is, substantially, the only difference I can recall. Taking all the provisions of the code of commerce together, they constitute the enabling act by which commercial or mercantile companies of any one of the three forms could be created by the will of the parties desiring to do so.

[fol. 60] Q. Now, a company organized under Section 3 of Article 122, and Section 151, etc., of the commercial code —does such company have a separate legal existence?

A. Yes. Mercantile companies, whether they are the collective type, the commandatory type, or the anonymous type, have juridical personality other than persons interested in them.

Q. By that you mean a life just like an anonymous corporation?

A. It becomes an article and by provision of law capable of being sued in—on any capacity of contracting with other persons including its shareholders.

Q. On that score, is a corporation like Benguet different than any other corporation?

A. In that respect, no difference to me.

Q. Does the law so provide?. The Philippine law?

A. As to juridical?

Q. Yes, as to being a separate entity?

A. In the civil code which was enacted a year after the code of commerce—I think in 1889—has a provision on that subject. Yes. In Chapter 2 of Title 2 of the civil code, the Spanish corporation dealt with the subject of juridical entities, or what they deem here juridical persons, and provisions that juridical persons are first, corporations and associations of public interest, second, associations of private interests, whether they be civil, mercantile, or industrial, to which the law grants individual personality independent of that of each one of the associates.

Q. Is that something in the code of commerce with reference to——

A. The code of commerce contains a provision that, let's see, if I can find that—Section 116 of the code of commerce dealing generally in the manner of establishing mercantile companies provides that after a commercial company has

[fol. 61] been established, it has what they deem legal representatives, which means it acts as an entity in all its acts and contracts.

Q. So that the law provides that an organization such as Benguet shall be a separate legal entity?

A. Subject to the condition that it shall have recorded its articles of incorporation in the Mercantile Registry; as such an organization stops short of that after the issuance of its articles in the corporation fails to record its articles in the Mercantile Registry, it is not permitted to sue in its corporated name and as an entity.

Q. In that respect, it is just as similar as an American corporation?

A. I see no difference.

Q. If the articles are not filed with the secretary of state, it is not a corporation?

A. The articles of the Philippines has to be filed with an officer designated by law which is a bureau of patent and trademarks. Whatever it is, it is an officer designated, who is a custodian of the articles of corporation of companies included under the Philippine law. The officer has the authority to file the certificate of corporation.

Q. You said the Benguet Mining Company was a commercial company?

A. Yes.

Q. Is there any difference between a commercial company organized under the code of commerce and a civil partnership organized under the civil code by adopting the form of a sociedad anonima under the code of commerce?

A. Yes. Under the mechanism of the Spanish civil law—that it is between civil associations, or what we call partnership, and mercantile associations—the mercantile associations being those organized for the purposes desig- [fol. 62] nated—any one of the articles designated in Article 123 of the code of commerce. The civil code also provides that civil partnerships, or associations, may be organized in one of the forms authorized by the code of commerce, but the fundamental difference between civil companies, or associations, what we would call partnerships—not mercantile—is that the civil partnership have a different degree of responsibility on the part of the partners in

the debts of the corporation. In mercantile companies, if the company is collective form, which permeates what we call a general partnership each and every one; "insolidum" is a civil term for all the debts and obligations of the council. If it is a commandatory company, then it is required that there be one or more general departments—collective departments, as they call them in Spanish—and there may be other limited partners. The collective partners are liable to full debts of the society. The limited partnership is instructed to business capital conserved, provided they go into it as the management. The law imposes on them the same personal liability as the one with general partners. In the anonima society, the liability of the members is restricted to their distribution to the cabinet. Of course, they receive shares transferable in the ordinary way. I was going on to say, in respect to the civil system, the rule of liability is different in this respect. That is, that the partners, instead of being obligated—each one—mancondima—which means each one is responsible for each share. That's the technical difference.

[fol. 63] Q. I was speaking solely about the sociedad anonima, irrespective of the other organizations.

A. I beg your pardon.

Q. Just sociedad anonima. Benguet is sociedad anonima organized under the code of commerce?

A. Correct.

Q. Sociedad anonima may be organized under the civil code, is that correct?

A. It may be organized. Yes, under the formation authorized by the civil code.

Q. Is there any difference between the two?

A. Yes. In each instance you have a juridical person resulting from the execution of the contract of company or associations, but in respect to the civil system, or partnership, or association, no requirement of registration in the mercantile registry exists. That is, the legal personality of the civil company organized under the civil code arises from the fact that the institution of the agreement in the public instrument.

Q. In other words, your answer is that both sociedad anonima, whether organized under the civil code——

Mr. Scherer: Objection. Leading.

By the Court: Probably under strict rules, it is leading.

Mr. Scherer: He's dictating in the record what Judge Fisher says.

By the Court: That objection, for the moment, will be sustained.

Q. Now, the next question will be, Does a sociedad anonima organized under the civil code—a sociedad organized under the code of commerce—do both of those have a separate legal entity?

A. Yes, they do. That is the outstanding peculiarity of the Spanish civil law with respect to these associations we call practicing, exists.

[fol. 64] Q. Now, are there any decisions in the Philippine court on the question as to whether or not the sociedad anonima has or has not a separate legal entity?

A. Yes, there are.

Q. There are. Could you refer us to some of those decisions?

A. Yes. I have, for convenience, made annotations and names of some of the cases.

Mr. Scherer: We don't deny it; that it has a separate legal entity—as a juridic person. We admit it is a separate juridical person; same as an Ohio partnership corporation is a juridical person.

Mr. Mercier: Of course we don't admit—we admit separate legal entity, but we don't admit an Ohio business, or corporation, is the same as a socieded anonima.

Mr. Mercier:

Q. Are there any decisions that you know in the Philippine Supreme Court that compare a sociedad anonima with an American corporation?

A. There are a number of decisions in which the court, dealing with litigation in which a sociedad anonima is a party, refer to this society as a corporation; use the term "corporation" in referring to it.

Q. Does the register of the Philippine Islands, in any of its acts, refer to a sociedad anonima society, as Benguet is, as a corporation?

A. There are two cases which I recall, in particular, which show, I think, that the Philippine register regarded the association anonima organized under the code of commerce as being, in effect, a corporation. I refer to Section 396 of the code of commerce of civil procedure enacted by the Philippine commission in 1901 dealing with the method by which process may be served on the various persons and [fol. 65] entities mentioned there. Paragraph 1 of Article 396 provides that if a suit is against the corporation formed under the laws of the Philippine Islands, then service of process should be made by whoever its president or other head of the corporation—secretary, cashier, or managing agent thereof. Then the next article deals with cases in which the defendant is a foreign corporation, or joint stock company, doing business in the Philippines. And at the end of paragraph 6 of that article, it is provided that service upon a corporation, as provided in Sections 1 or 2 may be made by leaving the copy at the office of the proper officer thereof if such officer cannot be found. Now, at the time this act was passed in 1901, there was no possibility of granting in the Philippine Islands, or under the laws of the Philippine Islands, an entity in the nature of a corporation excepting the code of commerce with the provision creating a—of a corporation creating anonymous companies—so that if the word "corporation" did not refer to anonymous companies, or sociedad anonima, but with this there would be no method of serving process on such an entity. It was not until 1906, I believe it was,—Yes, 1906, that the Philippine legislative body enacted a present corporation law and then repealed, operating prospectively, those provisions of the Philippine code of commerce which created the authorization of anonymous companies—share companies. The next instance to which I wish to refer is found in the corporation law enacted by the Philippine legislature in 1906, I think it was. Yes, 1906. Section 75 of this statute provides that any corporation or sociedad anonima formed, organized, or existing under the laws of the Philip- [fol. 66] pine Islands unlawfully transacting business in the Philippine Islands on the date of the passage of this act shall be subject to the provisions hereof, so far as such provisions may be applicable and shall be entitled at its

option either to continue business as such corporation or to re-form and organize under and by virtue of the provisions of this act transferring all corporated interest to the new corporation which, if a stock corporation is organized, to issue its shares of stock, at par, to the stockholders, or members of the old corporation according to their interest. My point is that this section refers to a sociedad anonima existing in the Philippine Islands under the laws of the code at the time of the enactment of a new corporation law in 1906. The legislature refers to them as corporations. And then again in the repealing clause of the corporation law of the Philippines of 1906, the legislature provided that the code of commerce, in so far as relates to corporations, or sociedad anonima, and all other acts in conflict herewith are hereby repealed. Then it went on to provide that nothing in the act should repeal the existing law relating to those classes of corporation which are deemed collective companies, commandatory companies, or share acting associations as to which associations existing law shall be deemed to continue in force and then provided further that existing "corporations or sociedad anonima lawfully organized as such will elect to continue their business as such sociedad anonima instead of reorganizing under the provisions of this act shall continue to be governed by the laws enforced prior to the passage of this particular act in 1906." It provides that the old law should relate to their regulation of their organi-[fol. 67] zation and method of transacting business and to the rights of members as between themselves, but that the relations and public officials should be governed by the provisions of this act. I refer to that showing that the legislature in these two sections of the code what appears to me to be obvious refer—use the word "corporation" as sociedad anonima, words as though they were completely anonymous.

Q. Are there any decisions of the Philippine Supreme Court which said that the sociedad anonima is a corporation?

A. They refer to it. They use the word "corporation" referring to that form of organization.

Q. Could you tell us——

A. I think so. I have one or two notes. Let's see—well, here's—this will—in Volume 4 of the Philippine Reports

there is a case which deals with a civil company in the anonymous form.

Q. I believe the last question was whether or not there were any Philippine Supreme Court decisions which called a sociedad anonima a corporation?

A. Yes, I think there are. May I see Volume 4 of the Philippine Reports, if you have them there. This is Volume 4 of the reports of the decisions of the Supreme Court of the Philippine Islands. I refer particularly to the case of Compania Agricola De Ultramar vs. Reyes Et Al, and it's in Volume 4 of the Philippine Reports beginning at page 3. This was an action from a summarized—to save time—brought by the company for the purpose of evicting a tenant; a land ownership corporation organized for the purpose of engaging in agriculture, and agriculture not being one of the activities mentioned in the civil code, as following under the discrimination of commercial activities it was a civil rather than a commercial organization. When [fol. 68] it brought this suit, the defendant opposed, I think, a—; anyway, the question was raised as to the right of this organization to maintain its action in a corporated name on the ground that it did not appear while it was organized in the form of an anonima sociedad with provision of the representation of its capital, but its shares had ever been represented in the Mercantile Registry and they contended that because the form was of the mercantile company because you bought shares—stock liability, frequently the—. It was a commercial company and should have been recorded in the registry and I presume it had been so. The court held, however, that because of this being a civil, as distinguished from a mercantile company, the registration of its articles in the registry was not a condition precedent to the execution of juridical personality and that it could sue, in its corporated capacity, as an entity. In the course of a decision, Justice Johnson refers to the articles by which the company was brought into existence as articles of incorporation. This company was organized in Spain under the civil code over there and it quotes it from language, the provisions of the articles dealing with the nature of the organization including, particularly, Article 5 which provides that only the invested capital should be liable for the capital of the company. That was of the organizers or

shares should be responsible for its debts. He then referred to Article 1 of the code of commerce determining what persons are regarded as legal and mature persons or regarded as merchants of the code showing that only commercial entity organizations are so considered, and then cited [fol. 69] Article No. 16 by reference to the code of commerce, particularly that part of it which says after a commercial company has been established, it shall have the right "to operate as a juridical person in all its acts and contracts", and then refers to Article 122 of the code of commerce without quoting by saying that Article 122 provides that—I am quoting from Justice Johnson—remarks that commercial associations may be a general or limited co-partnership or a corporation according to the particular form of the organization which it may adopt. I refer to that showing the court using the English word "corporation" as equivalent to the Spanish word of "sociedad anonima" in Spanish law.

Q. Are there any other Philippine——

A. Just a second—then he went on to show that the civil code had authorized the organization of stock companies, share interests, and gave them juridic personality and then held that the company having organized under the civil code, rather than a code of commerce which it had a right to do, in agriculture rather than to confine it to mercantile, was not required to sue as a corporated entity. That is the issue of that case to which I refer to.

Q. Are there any other Philippine Supreme Court decisions that you are familiar with that refers to a sociedad anonima as a corporation?

A. I think I will have to refresh my memory—then in the Strong case——

Q. I hand you the volume.

A. Volume 6, I am referring to—Volume 6 of the Philippine Reports at page 680—pages 680—the case of Strong vs. Gutierrez Repide—the subject matter of this litigation was a bloc of shares of the stock of a mercantile sociedad [fol. 70] anonima known as the Philippine Sugar Assets Development Company, Ltd. This was a company organized under the civil—under the code of commerce for the purpose of taking over land which had belonged to——

Mr. Scherer: I don't know sociedad anonima in—from my understanding, that is the best evidence of what those cases hold.

Mr. Mercier: The question is whether or not, in his knowledge, there are any Philippine Supreme Court decisions which refer to the sociedad anonima as a corporation. Now, he didn't give his opinion that a sociedad anonima is the equivalent to a corporation. Now, he is giving the basis of his opinion.

Mr. Scherer: He's attempted to interpret what these cases are to hold. Are you introducing these volumes in evidence?

Mr. Mercier: They'll be here for the use of the court.

Mr. Mercier:

Q. If you will just limit yourself, then, to the statement of the case which says it is the corporation, rather than give the facts.

A. Oh—on page 687 of this Strong—report of the Strong case—the reference is made to the articles of association of the sociedad anonima as the "charter of the company". And then again on page 690 in the front for reference, I suppose, the court remarked that the American cases are instructed to throw light on duties as corporated matters. This is whether there is a question as to Strong, who was controlling stockholder——

Mr. Scherer: Object in the record. I think these cases speak for themselves.

[fol. 71] Q. If you will just merely recite what the court said, touching on the question as to whether the sociedad anonima was an association——

By the Court: Are you objecting to the judge here as a witness referring to the statements made by the court in Volume 6, Philippine Reports?

Mr. Scherer: Yes. I think—I am not familiar with these particular cases. I think you have to know what the case is all about and read the whole decision. This may be obiter, I don't know.

By the Court: The court here has been advised, by counsel, the various reports referred to here will be left in the custody of the court reporter, that the court may have them for future reference.

Mr. Mercier: That's correct.

By the Court: The witness may testify, from the questions, with the exception of his opinion as to the respective decisions introduced here. Go ahead, Mr. Mercier.

A. Well, I refer to this language used on page 690. While up to a recent date we have had no private corporations, so deemed in our statutes, we have their American likeness, or partnership. The essential concept of a corporation is a legal entity endowed with succession of membership and merging in itself the primary individual liability and right of the associates. All of these qualities are possessed by anonymous societies. Individual liability is completely extinguished, and membership is determined by ownership of stock and the managers are chosen by stockholders. And on page 691—members have no title to the corporate property as such, which, on the contrary, is distinct from the shares owned by them—Those are the [fol. 72] particular references that I have.

Q. Do those cases go to the Supreme Court, do you know?

A. Yes. To the Supreme Court of the United States, and was reversed on the ground not affecting this question.

Q. The question was—Did the cases go to the Supreme Court?

A. Yes. They went to the Supreme Court of the United States.

Q. Does the Supreme Court of the United States refer to the company as a corporation?

A. Let me see here—incidentally, it does because it refers to the question being one of the "ordinary relations between directors and shareholders in a business corporation are not of such a—nature to require the disposal of the officer in buying shares from the stockholders." The references are the relations to the director and shareholder in a business corporation, and on page 431 a definite statement is made that the defendant who delegated (?) anonima sociedad was a director of the corporation refers to the anonima sociedad as the corporation.

Q. Are there any other decisions of the Philippine Supreme Court that you know of referring to sociedad anonima as a corporation?

Mr. Scherer: What volume?

A. This is 213 U. S., page 419. That's the beginning of

the decision. I think that the Hanlon case, in 40 Philippine Reports.

Q. What does the Philippine Supreme Court say in the Hanlon case?

A. The Hanlon case was a suit by——

Q. Just merely give the court the decision of the Philippine Supreme Court?

A. It was a suit against the Benguet Company. It's a [fol. 73] corporation. In the course of the decision, the court says the Benguet Consolidated Mining Company is a corporation which was organized in 1903 with an authorized capital stock of one million dollars, number of shares, etc.

By the Court: What is the page?

Witness. Yes sir. That statement appears on page 798 of Volume 40 of the Philippine Reports.

Q. Are there any other decisions of the Philippine Supreme Court designating a sociedad anonima as a corporation? In order to save the time of the court, you have annotations on this one?

A. Oh, yes. Mead vs. McCullough is another case. Volume 21 of the Philippine Reports, which begins at page 95, Mead vs. Philippine Engineering and Construction Company.

Q. Would you read from——

A. Yes. This partnership or stock company, sociedad anonima, is on page 106—upon the execution of a public instrument in which its articles of agreement appear, and the contribution of funds and personal property, became a juridical person—an artificial being, invisible, intangible, and existing only in contemplation of law—with the power to hold, buy, and sell property, and to sue and be sued—a corporation—not a general copartnership nor a limited copartnership—so cites, in support of the court's view.

(Judge) White: Read those citations.

A. The court referred to Articles 37 and 38; 1665 and 1666 of the civil code, and to the earlier case of the Compania Agricola de Ultramar vs. Reyes et al., 4 Philippine Reports, page 2. And the Chief Justice Marshall's definition of a corporation in 17 U. S., 518, the court following that was [fol. 74] a statement in registration of its articles was not necessary.

Q. The reference there is Chief Justice Marshall's opinion?

A. Yes. I stated, it doesn't give the name of the case. It simply says 17 U. S., 518.

Q. For definition of sociedad anonima?

A. No. It refers to Justice Marshall's—I just stated sociedad anonima is a corporation because of these attributions, it refers to these articles of code—to earlier cases—Compania Agricola vs. Reyes, and Chief Justice Marshall's opinion of a corporation in 17 U. S., 518.

Q. Are there any other Philippine Supreme Court decisions that you know which calls the sociedad anonima a corporation?

A. Let's see—I don't recall, at the moment, but there should be. I say there may be, but just at the moment I can't recall them by name.

Q. Do you know of any Philippine decision, by the Philippine Supreme Court, with reference to the service of process on a juridical person created on the code of commerce?

A. Yes. I remember a case that deals with that subject.

Q. To begin with, would you tell us how process is served? You have already testified to that.

A. I have referred to Section 396.

Q. Of paragraph 1 of the code of civil procedure?

A. Paragraph 1 of the code of civil procedure which was in force up to the time of the adoption of the rules of court system a few years ago. I'll just supersede this.

Q. Is there any Philippine Supreme Court decision which states how service must be made on a juridical person by the code of commerce?

[fol. 75] A. Yes. I think it is the Vargas case in Philippine Reports 29, page 446. The case involves validity of service on the company organized under the——

Q. Would you merely read the book. They have objected, and we'll pass by the objection.

A. "We are of the opinion that neither of these contentions can be sustained. As to the first, we may say that it has been the universal practice in the Philippine Islands since American occupation, and was the practice prior to that time, to treat companies of the class to which the plaintiff belongs as legal or juridical entities and to permit them to sue and be sued in the name of the company, the

summons being served solely on the managing agent or other official of the company specified by the section of the code of civil procedure referred to." This very action is in vogue in the Philippine Islands.

Q. Now, the section of the code of civil procedure referred to was Section 396, paragraph 1, of the Philippine Supreme Court?

A. What did you say?

Q. I say, you have read out of this: You said that in this Vargas case, the Supreme Court said the summons being served solely on the managing agent specified by the section of the code of civil procedure referred to.

A. Yes.

Q. What section of the code?

A. They were referring to Section 396.

Q. And what paragraph?

A. Paragraph 1.

Q. The Supreme Court say so in its opinion, does it not?

A. I think so. Yes, it says so.

Q. Section 396, paragraph 1?

A. Section 396, paragraph 1, deals with service on a corporation. I should say service, rather than service on a corporation.

[fol. 76] Q. Are you familiar with the notation of the Spanish Civil Code by Willett?

A. Yes.

Q. Did you know Willett?

A. Yes. Justice Willett was a very able member of the Supreme Court of the Philippines part of the time I was clerk of the court there.

Q. Did he ever express an opinion in his court—are you familiar with those notations?

A. Oh, yes.

Q. Did he ever express an opinion in those notations with reference to what you have testified to here today?

A. I couldn't hear you.

Q. In his notations, does he express an opinion different than that expressed by you that a sociedad anonima is like an American corporation?

Mr. Scherer: Objection.

By the Court: Is that in evidence?

Mr. Scherer: Yes.

By the Court: The objection is sustained.

Q. Now, you have kept yourself familiar with the Philippine decisions, have you?

A. Reasonably so. Of course I have always been interested, and I have been called upon from time to time to give opinions in matters of Philippine law and of course in definitions of books I have put out I have familiarized myself with that.

Q. Until these books were revised this year?

A. Naturally I would be interested in the subject, having practiced law so long.

Mr. Mercier: That's all, if your Honor please. Now, one more question—it might be prolonged.

By the Court: That's quite all right.

[fol. 77] Q. Judge Fisher, I hand you Page's Ohio General Code, Annotated, Volume 5, and I call your particular attention to the sections thereof on partnership associations beginning with Section 8059 and going to Section 8078?

A. Yes.

Q. Would you mind familiarizing yourself with those sections?

A. This is an old familiar book, Page's Code. I have reread these sections this morning, so I am fairly familiar with them.

Q. And you say you were a member of the bar of the state of Ohio?

A. I am, unless they have moved me down the row without my knowledge. I was admitted in Columbus.

Q. From reading those sections, would you say that there is any similarity between the type of partnership referred to in these sections and a sociedad anonima organized under the code of commerce of the Philippine Islands?

A. Generally, no.

Mr. Scherer: What sections?

Witness: I am referring to Sections 8059 to 8078.

Mr. Scherer: Objection. The court certainly—that is a question for the court to determine whether there is any difference. You have introduced the Spanish law. The

court is familiar with the Ohio law. It's up to the court.

Mr. Nichols: I think it is very competent.

Mr. Scherer: It's not for this witness to say any difference.

Mr. Mercier: I think it is very competent.

Mr. Scherer: You can argue it—in his brief—but to have a member of this bar tell your Honor there is no difference [fol. 78] between the Ohio partnership—that there is a difference, or no difference between the statutes governing Ohio associations and the laws of the Philippines which he has introduced and which he has given his opinion on, I think that's highly improper.

By the Court: You have anything, Mr. Mercier?

Mr. Mercier: Yes. This witness has been called here to try to instruct all of us in the matter of the Philippine law. As such, he is an expert just as is called in any other case to testify to the law of a foreign country or to the law of a foreign state. Such a witness has such a right under all of the decisions to make a comparison in order to exemplify and typify the opinion he gave. He always has that liberty and that discretion. In other words, the question is—is an Ohio partnership association, as covered by the section of the Ohio code, similar, in any wise, to a sociedad anonima? He says he is a member of the bar of the state of Ohio and a member of the bar of the Philippines and he knows what the characteristics are of the Philippine sociedad anonima and he knows what the characteristics are of an Ohio business association, and he can testify whether or not they are the same.

By the Court: The witness has most certainly and most excellently qualified himself as an expert, beyond any doubt. The question in mind of the court now is this: Has an expert witness the right, under Ohio law, to give his opinion on anything other than the similarity or nonsimilarity of the laws of the state of Ohio and/or the laws of some foreign country.

(Judge) White: That's just what we asked him.

[fol. 79] By the Court: For the purpose of the record, that latter part may go in the record for what it might be worth. The objection, to that extent, is overruled.

A. Only to the extent that provision is made by this Ohio statute for the organization of the partnership with restricted liability. The other difference to which I direct attention are strikingly important. In the first place, Section 8059 provides that such a limited partnership association in Ohio may be organized by not less than three or more than twenty-five persons. Of course, no limitation in the Philippine law with respect to the number of persons required to organize a sociedad anonima. The Benguet Company was organized by three persons. There might have been ten or might have been twenty; might have been two, other persons to create an agreement. Then the limited partnership, under Section 850 of our code——

Mr. Scherer: Your are referring to limited partnership or partnership associations?

A. Partnership associations. I meant our Ohio Code provides that a partnership association may be formed for the purpose of conducting any lawful business in the United States, or elsewhere, excepting in dealing in real estate or banking. Under the Philippine Code, an anonymous company may be organized without restrictions in dealing with real estate or engaging in banking. I am referring, of course, to 1903, the time this was done or the time before in the acts of commission was restricted in the nature of all corporations in the Philippines with respect to acquire in the state dealing with them. This prescribes the time in [fol. 80] which the capital subscribed must be paid in. There is nothing in the Philippine law with respect to the time in which the subscribed capital of an anonima sociedad must be paid in. It continues—provides to the effect that, if it is not paid in and any liabilities existent, creditors—then the already subscribed can be compelled to make payment and of course the payment is under the terms of agreement. There is no definite subscription system as this. This provides that the duration of an Ohio corporation shall, in no case, exceed twenty years. Under the Philippine code of commerce there is no restriction whatever except that statute requires that the duration of the company must be stated in the articles. In Section 860—requires an Ohio limited partnership association to keep a register of debts and liabilities open to inspection of all persons interested in the business or financial standing of

the association. There is nothing similar to that in the Philippine code of commerce in respect to anonima societies or companies. They merely are required to register their articles. Section 861——

Mr. Mercier: You mean 8061.

I mean 8061 of the General Code which establishes sanction for the registration of debts and liabilities by providing that failure to make such record, members of the partnership association, a limited partnership association shall become personally and individually responsible for debts and liabilities of the partnership contracted during continuation of such negligence or failure to make such a record. There is absolutely nothing in the Philippine Code—there is nothing whatever that makes the members of a Philippine anonymous company, or shareholders, responsible for its [fol. 81] debts, individually, beyond the amount they have paid in as the value of the shares which they have taken. A similarity exists in 8062 to the effect that members of a partnership association shall not be liable beyond any judgment against the association excepting to the extent provided by this statute. That, of course, is the rule with respect to the owners of shares in a Philippine anonymous company, but they are not liable but there is no society, excepting—because no society is established by the Philippine law. The limitation of liability is positive in Philippine law. In Section 863 there is a provision determining conditions under which the property of partners of a limited partnership association may be levied upon in case a Philippine bonds issued on the company itself. There is one in the Philippine code of commerce similar to this undoubtedly. Under the map of procedure in the event that such an anonima society were going through a process of registration, there would be methods by which the creditors could require stockholders had not paid the amount they were to pay would be concerned to pay to the register the amount you pay the subscription. And then 8064 on the page requires the word "limited" to be used as a qualification in connection with a name of an Ohio partnership association. And Section 8065 makes every person who is a participant in the machine of the word "limited" or knowingly acquiescing in such omission, liable for all liabili-

ties arising therefrom. There is no such requirement in the Philippine law. The Philippine law of limited—I mean of anonymous companies authorizes and requires the use of an artificial name. It does not permit the use of an individual name. We couldn't incorporate under Spanish [fol. 82] —John Jones & Co.—an anonymous company. It would have to be—The Philippine Road Company—or Benguet Mining Company; no individual name is allowed to be used. That, I think, is because the other provisions relating to other juridical persons who are companies under commercial law are required to operate under the names of one or more of the general partners. That is true with respect to the collective system in which all the members are unlimited, liable for debts concerned, and for the commandatory system which we would call, appropriately, a limited partnership in which the limited partners liable is restricted to the amount they buy in, but they are not allowed to put their names on the firm name at all. So there is nothing in the Philippine law similar to this requirement of the Ohio law concerning the use of the word "limited" as a means of restricting the liability of one of the association to the amounts paid in or undertaken to be paid in. And 867——

Mr. Mercier: 8067——

A. Yes. 8061; Section 8067 provides—"that no transfer of interest in such an association to another person will be permitted unless he be elected by a vote of the majority of members in number and value of their interests," showing —just to refer to it very briefly—the association—whereas, under the Philippine law there is no restriction whatsoever about the transfer of shares in an anonymous company. They can be transferred just as readily as the shares of an American corporation, or of the shares of a corporation, now organized under the Philippine corporation law. Section 8068 requires meetings of the members of the associa- [fol. 83] tion that is, a limited partnership association—once, at least, in each year. There is nothing in Philippine law which determines that; the periods when such meetings should be held. It simply requires that the articles shall determine the time at which general or special meetings of shareholders shall be held. Section—this same section,

8067—just a second—by any change of ownership, whether by sale, death, bankruptcy or otherwise, which is not followed by election to the association, shall entitle the owner only to his interest, at a price, and upon terms mutually agreed on, and in default of such agreement, the price and terms shall be fixed by an appraiser appointed by the Common Pleas Court of the proper county, subject to its approval—there is nothing in the Philippine statute in the code of commerce relating to anonymous companies at all similar to this provision of the Ohio law which is based upon the idea that a personal relation of confidence exists when men become partners in a partnership, although it be a limited—so that a stranger is not, without consent of the others—where in a Philippine anonymous company there is no personal relation; the ownership may change from day to day. The whole personnel of the stockholders may change every week, and there is no restriction on that at all. Then there is a section, 8069, provides, that no debt shall be contracted by a limited partnership association under the Ohio law, except by one or more of the managers and no liability for an amount exceeding $500.00 excepting against the person incurring it, shall bind the association, unless reduced to writing, and signed by at least two mana- [fol. 84] gers—there is nothing in the Philippine code of commerce at all similar to that and at the time when this particular company—the Benguet Company, was organized, there was no restriction as to the requirement of writing evidence indebtedness. Of course, when the Philippine law of civil procedure was adopted by the Philippine Commission in 1901, they wrote into it the American statute of frauds requiring evidence in writing in certain cases. The matter of the division of profits under Section 8070 does not attempt to determine the particular time the shares should be divided and nothing in the Philippine law, as I recall, that it be divided at any particular time. I am leaving that to the determination of the particular parties and in the writing of their articles of corporation, or agreement, under which the company is brought into being. Section 8071 prohibits such an association to loan it credit, capital, or name to any person or corporation. It is very clearly restricted transactions in which it may engage. There is nothing in the Philippine law on the subject of

anonymous companies which prohibits them from becoming —or using the name or capital for any other person. On the contrary, the code expressly provides that credit such as banks and enterprises of that kind which would engage principally in the transaction may be created to juridical persons under provisions of law. Those provisions are applicable, not only to anonymous companies, but also to the general mercantile companies, and to the commandatory or limited mercantile companies. I think that covers the difference that I had in my mind.

Q. Could you—the code of commerce, as well as the several code references—to the companies organized under [fol. 85] their provisions as juridical persons, would you give us a definition of the words "juridical persons"?

A. Yes. The term "juridical person," in Spanish civil law, both ordinary and mercantile, means an artificial being existing in contemplation of law having existence independent of that of individual human beings being created as members from time to time and permitted to contract and assume responsibility in suing or defendants in its individual corporated name without joining any of the individual human beings interested in it.

Q. One final question--Are you a shareholder of the Benguet Mining Company?

A. No. I was many, many years ago before Mr. Haussermann became interested in it.

Q. That was along when?

A. I think—my recollection is, as you see from the articles of incorporation, started by a man by the name of Clark as principal member. I bought in 10 cents a share. It gradually went up to a peso a share, which is a dollar, and we had a flood and I sold that year, which was to my sorrow.

Q. About when?

A. I think about 1905, or 1906. The thing laid fallow in the bank for some time after Clark died.

Q. I have no further questions.

Cross-examination.

By Mr. Gordon Scherer:

Q. Judge Fisher, you were counsel for Benguet Mining Company up until what year?

A. Up until I left the Philippine Islands in 1927. That is, my firm acted as general counsel for the company.

Q. Then you are not familiar with the fact that as late as last year, in the statement of registration of this com-
[fol. 86] pany, with the Security Exchange Company it specifically denied it was a corporation?

A. I have never seen anything of the kind.

Q. You are not familiar with the fact that in the answer of the California case in which the same parties are involved as in this case they specifically denied it was a corporation?

A. I had nothing to do with that litigation, Mr. Scherer.

Q. In the cases you have referred to in the Supreme Court cases of the Philippines, in any cases was that the point whether or not a sociedad anonima was a corporation?

A. That definite question arose in, I think, it was Hanson v. Hardin; Hardin v. Benguet Company.

Q. That is the case I am not asking you about. I am asking you about the cases you have referred to—the Supreme Court cases. Was that the real issue in these cases, whether a corporation was a sociedad anonima?

A. It definitely was in the case of Compania Agricola de Ultramar v. Reyes, et al., because a lower court had denied the right of that company to sue in its corporate name.

Q. That was merely because (I haven't read the case) it failed to register?

A. The contention was it should have been, and the Supreme Court decided it need not do so, but the question was definitely whether that organization could maintain a corporate—what I call, a "corporate name".

Q. What you call a "corporate name". That was a sole question?

A. Yes.

Q. Before a company in Ohio can maintain a suit, it must also register, must it not?

A. I think so.

[fol. 87] Q. Isn't it a fact that the only case in the Philippine Islands where this issue was directly in point was the case of Hardin v. The Benguet Consolidated Mining Company?

A. So far as—excepting the case I referred to. I can't refer to any other.

Q. Wasn't it a fact that in the case of Hardin v. Benguet Mining Company that was a case where the owners of the minority of stock in the Balatoc Mining Company—Balatoc is a subsidiary of Benguet—is that right?

A. Benguet. Yes.

Q. Now, Balatoc Mining Company, is a Philippine corporation, is it not?

A. I think so.

Q. Balatoc Mining Corporation is a corporation organized under Philippine code?

A. I don't think they call it a code. I think they call it Philippine corporation law.

Q. Philippine corporation law as passed in 1906?

A. That's it. I have no direct knowledge of that, but I think it is so stated in the opinion in the Balatoc case.

Q. The Philippine corporation law, as passed in 1906, is similar to the Ohio corporation code, is it not, Judge?

A. I think you may say it is similar to general American statutes providing general corporation laws.

Q. That would make it similar to the Ohio corporation act?

A. Almost; more closely followed California act, than any other.

Q. But it is still similar to the other corporation?

A. Undoubtedly. Yes.

Q. You are familiar with the fact Benguet represented 64½ per cent of the common stock of Balatoc?

A. Because I read those opinions; otherwise, I had no [fol. 88] knowledge of it because that occurred after I left the Philippines.

Q. From reading the opinions?

A. Yes, and get acquired stock from the Balatoc.

Q. And in the Hardin case minority stockholdess of the Balatoc Mining Company filed an action in the courts of Manila in which these minority stockholders of Balatoc contended, specifically, that Benguet could not own stock in Balatoc because of the Philippine law which prohibits one mining corporation from holding stock in another mining corporation. Was that not the contention of the minority stockholders of Balatoc in that case?

A. I think the statute on which they relied was the act of Congress on the subject, rather than the local statute.

Q. Refreshing your recollection, wasn't it Section 13, paragraph 5, of the corporation law of the Philippines?

A. That section repeated some of the provisions of the act of Congress on the subject, but I think they relied more on the exact terms of commerce itself.

Q. On which act they relied, their contention was that Bengeut had no right, because it was a corporation, to hold stock in another mining corporation because it was prohibited by law?

A. They contended it was ultra vires for them to do so.

Q. Didn't the court hold, and Benguet contend, and successfully contend, that it was not a corporation; that it was a sociedad anonima, and therefore the law did not apply to it which prevented one mining corporation from holding stock in another mining corporation?

A. I think not. I think one of the differences set up in that action was a sociedad anonima was not the kind of a [fol. 89] corporation to which the act of Congress related in establishing that restriction on stock ownership, but you said did they successfully contend. The court didn't pass on the question at all. The court, in disposing of that case, held they would not decide that question because of the fact that the plaintiffs were not entitled to raise the question of ultra vires and it could only be raised by action of the attorney general, which was never done.

Q. Now, you are referring to the decision of the—or the opinion of the Supreme Court?

A. I am referring to the decision of the Supreme Court; the ultimate decision in the case.

Q. Didn't the court in Manila find in favor of Benguet on the basis that it was not a mining corporation?

A. I don't think I ever read the opinion of the trial court. I believe they did because I think that was one of the grounds on which the appeal was carried up.

Q. The Supreme Court sustained the lower court but did not pass on the issue?

A. They declined to pass on the issues on the ground it was unnecessary to do so because they maintained the plaintiff need not raise that question.

Q. They said the plaintiffs only the government couldn't maintain it?

A. Yes.

Q. So that the decision of the lower courts stands as the only decision in the Philippines on this point?

A. Except to the extent it was reversed by the appellate court.

Q. The appellate court did not reverse the decision in the Hardin case?

A. They declined to adopt that reason because they had no occasion to do so.

[fol. 90] Q. They affirmed the lower court, did they not, and they said they did not have to pass on that question because as you said, the only person that could attack the corporated status of either of these companies was the government itself?

A. Correct. They sustained the result of not allowing the plaintiffs to recover, but the decision of the Supreme Court rested exclusively on the ability of the plaintiffs to raise the question of ultra vires. I am repeating what the decision says.

Q. Didn't you read the decision of the court of first instance?

A. I never saw it. You see, that happened after I left and I never saw the records of the case. All I know about it is in Justice Streit's opinion, in writing the opinion of the Supreme Court on the appeal.

Q. You know, as a matter of fact, from discussing it with counsel here, that the court of first instance, which was affirmed by the Supreme Court here if a decision granted under a code of commerce in the Philippines does not fall within the definition of the corporation and that Benguet was not a corporation?

A. I don't know; as I have never read the decision, I wouldn't know. It's quite possible, for all I know, that the decision of the trial judge was that the wording of the statute; that is, the act of Congress on which—Section 11213, on which our corporation laws are based, being a restriction on the power to hold stock would be strictly construed and not applied to a corporation, that is a matter I know nothing about. I haven't read that opinion.

Q. You came to testify on this very question and you

have no real opinion in the Philippines on this very question?

A. I told you I have never read the opinion of the trial judge in that case. I have never seen it.

[fol. 91] Q. That opinion was never reversed, was it?

A. Excepting to the extent that the court held it was unnecessary to pass on that question.

Q. Then that remains the law of the Philippines?

A. I think not.

Q. You think not?

A. I think the opinions of the trial courts are not authoritative and binding on any other trial court or Supreme Court excepting they are written into the decisions of the Supreme Court.

Q. You knew that was the position that Benguet took in the case?

A. I knew they set up that. That sociedad anonima was not subject to association of Congress in corporations. I read that.

Q. Didn't the court tell you that the court further held that the law prohibiting a mining corporation from being any way interested in any other corporation did not apply to a sociedad anonima?

A. I don't remember ever having that statement made.

Q. Further that a sociedad anonima of its articles and powers to members and neither right to exist or powers were derived from the state?

A. As I say, you are reading something I have never seen.

Q. That is true from the law, though, that a sociedad anonima gets laws from laws of association?

A. Read in the light of the statute, of course.

Q. But not from the state, does it?

A. We think it certainly does. The state enacted the law that permitted it to be brought into being. The code of commerce in those provisions relating to anonymous companies is a general corporation law which the terms and conditions in which individuals may present into being a juridical personality. Therefore, such a personality, when [fol. 92] created, derived its power from the state. The individuals have no power to do it.

Q. The Ohio law provides how persons may form partnership associations and limited partnerships?

A. Yes.

Q. The same as the old Spanish law set out persons may join together in associations and form a sociedad anonima, isn't that right?

A. It combines the methods by which such an organization can be created.

Q. A sociedad anonima never received a charter from the state?

A. The Supreme Court, in one of the decisions which I read to you, refers to the article as its charter.

Q. I am asking you whether Benguet ever received a charter from the government of the Philippines?

A. The provisions of the code of commerce of the Philippines——

Q. Answer my question, and then explain.

A. That is like the old question—"Have you stopped feeding your wife?"—yes. Yes. It makes no provision for that particular kind of — is issuance of a charter by an officer. It provides that the — of a company commences on the performance of an act required by a corporation; namely, the registration of its articles in an association.

Q. Well, the Ohio law provides that a limited partnership association begins to function when it files its partnership contract or agreement with the clerk, does it not?

A. I think so.

Q. Under the present Philippine law passed in 1906, the state does issue a charter to corporations, does it not?

A. Pardon?

[fol. 93] Q. The state does issue a charter?

A. It offers a certificate of corporation. But it's not what you call—it's not an act of the legislature creating a charter. It's all done under general corporation laws.

Q. Same as Ohio?

A. I suppose so.

Q. Now, this Plaintiff's Exhibit 1, which you referred to previously in your testimony, is a photostatic copy—certified photostatic copy of the registration of Benguet with the Department of Agriculture and Commerce, is it not?

A. No. This is a certificate by the officer in charge of

this department that it was filed in the Mercantile Registry.

Q. That's right. That Mercantile Registry, that is what?

A. The articles of association by which the Benguet Company was established.

Q. And that certificate says that it was filed in Volume 12 of the book of partnerships, does it not?

A. Undoubtedly it does, that being a translation of the translation (Spanish).

Q. This was filed as late as March 21, 1938, it was filed in the book of partnership?

A. No. This is the date on which the officer made the certification.

Q. When was it filed?

A. The certificate doesn't state when it was filed; simply says it was duly transcribed.

Q. But in the book of partnership? Now——

A. If you will allow me——

Q. What were you going to say?

A. I was—the matter of registration, of course, is determined by the objectives of the code of commerce in force at the time the company was created that determines where the registrations should be made. Let me clarify that a bit——

[fol. 94] Q. Where are the articles of——.

A. Pardon me just a second—I am referring to Article 119 of the code of commerce which provides that every commercial company, before beginning its operations, shall establish its articles determining the conditions upon which it is created in a public instrument "which is to be filed by registration in the Mercantile Registry in accordance with the provision of Article 17." If you will permit me, I'll refer back to 17. And Article 17, with which you probably are familiar, provides that registration in the Mercantile Registry should be optional for individual merchants, but obligatory for companies organized in this code, and under the special laws, and vessels. (Ships, of course.)

Q. Now, the certificate——

A. Pardon me just a second——

Q. The certificate——

A. Will you pardon me just a second—I am reading something here. I want to read this Volume 1—go ahead.

Q. A corporation that's organized under the present

organization law of the Philippines was passed in 1906. It precedes, what do you say, a certificate?

A. I think they call it a certificate of corporation.

Q. From the government of the Philippines?

A. From the officer in charge of the office in which the articles have been filed. It has been changed from time to time on different departments.

Q. Now, under the code of commerce of Spain, Judge, there were only three types of commercial organizations that could be formed, is that right?

A. Yes. The general, the commandatory, and the anonymous. Then there was another organization in juridical [fol. 95] personality. The other business organization was a joint act association which didn't constitute a legal person.

Q. Doesn't Article 116 in the code of commerce make all partnerships organized under juridical persons—all forms of partnership?

A. Mercantile companies, they refer to here, shall have juridical personality in all their acts and contracts. Of course, a juridical personality of civil partnership is determined by the civil code.

Q. Aren't general copartnerships—Articles 125 to 144—juridical persons under the code of commerce of Spain?

A. Yes, if they are properly recalled.

Q. And aren't limited partnerships, under Articles 145 to 150, under the code of commerce of Spain, juridical persons, as you define juridical persons?

A. Undoubtedly, they are.

Q. They are partnerships, are they not?

A. They are partnerships, and mercantile companies are the expression used.

Q. Now, when the corporation law was passed in 1906, I believe you stated that it gave existing sociedad anonimas the right to continue as sociedad anonimas?

A. That is what the code says, or the statute says.

Q. Or gave them the right to reorganize as organizations?

A. And provided as they did, so they would take over the rights of the old corporation.

Q. Naturally, but it gave them the right to reorganize as corporations under the 1906 corporation act?

A. It gave them the right to act under the 1906 act.

Q. And then sociedad anonimas, like Ohio partnership—limited partnerships—had an existence for how many years?

A. There was no limit under the code of commerce as to [fol. 96] the length of time for which it might be created.

Q. Didn't they have to elect under a corporation code after a number of years?

A. You are talking after sociedad anonima?

Q. Yes, sir.

A. A sociedad anonima would continue for as long as they didn't want to quit. It could be 500 years. The law simply provided that the duration of the law under the code of commerce, but fixed no time on which the parties—say the sociedad anonima could continue.

Q. But the parties could elect a number of years?

A. Of course they could.

Q. And didn't the Benguet elect a certain number of years?

A. I can't recall, without looking at the articles. Yes, they could do that.

Q. And in 1906 Benguet elected to continue as a sociedad anonima?

A. So far as I know, there was no act of election. It simply failed to avail itself of the right to organize under the corporation law, continued without any change.

Q. The 1906 law prevented the creation of any future sociedad anonima, did it not?

A. It did. It repealed it as to any future application, but left it in force with respect to existing sociedad anonima.

Q. I am not positive about this, but didn't Benguet's 50-year period expire recently?

A. I don't know. Let me see——

Q. That was in 1943.

A. Pardon me just a second——

Mr. Mercier: 50 years from 1903 makes 1953.

A. It was executed on the twenty-fourth day of June, 1903.

[fol. 97] Q. All forms of partnership under the Spanish code of commerce were juridical persons, were they not, as you defined them?

A. The——

Q. All forms of partnership, under Sections 121 and 122 of the code of commerce, were juridical persons?

A. Provided they can comply with the requirement of juridical administration. Would it disturb you if I interrupted you a second——

Q. No.

A. You asked me something about the registration of the company.

Q. Your counsel can——

A. You asked me the question.

Q. You want to give an additional answer?

A. I want to show this was registered in the Mercantile Registry.

Mr. Mercier: I submit he may be permitted to answer.

A. You asked me the question. This is the original, not a photostatic copy. I notice there is a certificate by the Mercantile Registry. Following the signature of the parties to the articles, there is a certificate of acknowledgment by a notary before whom the articles were acknowledged by the parties. His name was Andre Ballera.

Q. That was in 1903?

A. Exactly.

Q. When they formed the sociedad anonima?

A. That's right. That same person, who is a notary public, was also the officer in charge. He was the mercantile registrar at that time. And he has added another note—so it appears from this signed original document from which I refer and which was presented to this registrar at 10:00 a. m. of this date, Manila, August 12, 1903—now, it's not shown on this photostat, but I am perfectly sure if we had the original Spanish document, you will find at this point the seal of the mercantile registrar showing the Mr. Ballera [fol. 98] referred to was the mercantile registrar to show it was recorded in the register.

Q. I don't think any question that was in the Mercantile Registry, but still in the book of partnership?

A. It doesn't say.

Q. Yes.

A. Yes, because the answer is, they only had one book in the Mercantile Registry for the registration of companies. Sociedad, the fact he has seen fit to translate the word sociedad into partnerships, of course, can't change the

meaning of the Spanish word sociedad, which is the word used in the statute, hasn't been changed.

Q. Sociedad means anonymous in English?

A. It means anonymous company.

Q. Have you seen the articles—bylaws of this company?

A. I must have.

Q. We have them here in evidence somewhere. I'll show you a photostatic copy, Judge, of the bylaws of Benguet Consolidated Mining Company, as submitted to the security and exchange commission in its registration certificate and ask you whether or not you have ever seen that?

A. I never have.

Q. Where it says—the anonymous capital stock, or partnership, of this sociedad anonima herein referred to as the company?

A. I have never seen it. Of course, that statement couldn't possibly change the legal nature of the company which is under the applicable statute of the company under which it was created.

Q. Did you know, Judge, that in this very registration—statement of registration in the security and exchange commission of the United States—that the company voted the decision of the court in the Hardin case in substantiating [fol. 99] its position that it was not a corporation?

A. I know nothing about it because I have never seen it.

Q. And then it quoted——

A. I say I know nothing about it. But whatever they said about themselves, it couldn't change the legal status of the company which was determined by the application of the law to what they did in creating the company.

Q. Would you say, Judge, that an Ohio partnership association, or a limited partnership—an Ohio limited partnership—is a juridical person?

A. May I see that statute, again, please?

Q. While he is getting that statute—let me withdraw that question, temporarily, and ask you another question first, Judge.

A. All right.

Q. Would you say that an Ohio partnership association—Ohio limited partnership—can sue and re-sue its firm name?

A. I want to look at the statute again because that is on Ohio law on which I am not testifying as an expert.

Mr. Mercier: Seems to me that counsel for plaintiff is violating the very objection he made before because the judge has said he could not testify on Ohio law.

By the Court: This is cross examination and he is laying down the bars. You may go ahead hereafter.

Mr. Mercier: I am quite satisfied, but he is——

Witness: Frankly, I can't answer that question. I don't know whether they could, or could not.

Q. You mean you don't know whether they can or cannot?

A. I do not.

Q. Or whether they can hold property in the partnership name?

A. Again, you are asking me a question of Ohio law [fol. 100] which I have never had occasion to look up and I don't want to guess at it. I don't know whether the deed runs in the individual names of the partnership or whether in the name of the partnership itself. I don't know.

Q. Are the answers to these questions I am asking you now absolutely necessary for you to give the opinions which you did just give to the judge on direct examination?

A. Certainly not. I answer——

Q. That's all.

A. I answered in the particular light of this statute I have before me pointing out the difference in those particular provisions and differences in Spanish law of anonymous companies.

Q. That 's all.

By the Court: Have you anything further, Mr. Scherer?

Mr. Scherer: Nothing further with this witness.

By the Court: These gentlemen have said no further redirect examination.

Mr. Mercier: May I ask just one question?

Mr. Mercier:

Q. You are familiar with the Philippine corporation law?

A. Yes.

Q. Section 135 which contains prohibitions—now, my question is this: Are those prohibitions limited to corporations created under that act or are those provisions applicable to sociedad anonima?

A. I am inclined to think that some of them would be

applicable to sociedad anonima because the act which provided—that is, the section of this act—which provided sociedad anomina might continue to do business without [fol. 101] reorganization provided that they should be governed by the old law with respect to—and I point out the exact language here——

Q. Let me ask you this way—under the code of commerce, was there any provision against a mining company organized under the code of commerce from owning stock in any other mining company?

A. None whatever.

Q. Thank you very much.

Mr. Scherer: It was agreed, at the time we entered into this stipulation with Judge White, they stated that they wanted to introduce some additional evidence that would take about a half an hour or so and Judge White and I agreed if anything developed that we wanted to answer, we could have that time. We did not know the testimony they were going to offer this time. We didn't want to take additional time. I handled the testimony, Mr. Hartsock argued the case. Mr. Hartsock had to leave and wasn't feeling well, and we would like some time now to examine these decisions. This is the first time we have heard of them, and go over these decisions.

By the Court: That is no more than fair.

Mr. Scherer: And we want Mr. Hartsock to do it on his return.

Mr. Mercier: These are the same decisions we had in Cincinnati. If your Honor please, we don't want—we wouldn't like to have happen here what happened in Cincinnati; protracted delays—hearing started in May and then in September just because the other side wanted to get other testimony. In this particular case, we have introduced nothing new. The exhibits and testimony is all before your Honor. The case has been alluded to our cases before Judge Bell. Now, there's nothing new today except-[fol. 102] ing the expert testimony analyzing those cases. But there is nothing new about that, that should require a stay of a week or two's time.

Mr. Scherer: I thought this was all additional testimony. You say all of these cases were cited before Judge Bell?

Mr. Mercier: Yes. You will find them in my discussion and in your brief with the exception of one Philippine report.

By the Court: Does counsel care to take the books home or to your office? I don't think this court needs the books at the moment until all of you gentlemen have concluded.

Mr. Scherer: Well, we'll answer them, then, by brief.

By the Court: Let's get each other straight. Mr. Mercier has closed the case in so far as he has any introductions in chief. Do I understand you, Mr. Scherer, that you will have no further testimony?

Mr. Scherer: No further testimony, your Honor. I just understood they wanted to argue the matter tomorrow.

By the Court: As the case stands on either side, it's a matter of the argument of counsel.

Mr. Scherer: That's right. I just wanted some time to look these cases over.

By the Court: May you gentlemen agree to the time?

At which time it was agreed upon by all counsel that argument of the above case would be October 1, 1948, at 10:00 a.m.

Court was adjourned at 1:40 p. m.

[fol. 108] In Court of Common Pleas

Judge's Certificate to Bill of Exceptions

The court thereupon has written an opinion in favor of the defendants, Benguet Consolidated Mining Company, et al., as appears of record in this cause.

And the plaintiff, upon notice of such opinion, filed a motion for a new trial accordingly which motion was duly overruled by the court as shown by the record in this cause.

The plaintiff now having prepared and filed, according to law, this her bill of exceptions containing all of the evidence in such cause and notice of such filing having been duly served upon the trial judge as required by law, the bill of exceptions is now hereby allowed and signed by the trial judge and is now made a part of the record in this cause on this thirtieth day of December, 1948.

Harry Britton, Trial Judge, Clermont County, Ohio.

IN COURT OF COMMON PLEAS

REPORTER'S CERTIFICATE

I, Katherine Kernohan, the duly appointed and now acting official court reporter for the Common Pleas Court in and for Clermont county, Ohio, do hereby certify that the foregoing bill of exceptions was by me duly taken in shorthand and thereafter transcribed, and that the same is true and correct in all respects and transcribed from my stenographic notes.

I further certify that I have, in court, all of the exhibits presented in the hearing in this cause and that such exhibits have been transmitted by me to the clerk of this court to be made a part of the record in this cause.

[fol. 104] I am not related to any of the parties in this action and am not an attorney for either of the litigants.

This bill of exceptions has been prepared for and in behalf of two cases, to wit: Case No. 22185, and Case No. 22191, instigated in the Common Pleas Court of Clermont county, Ohio.

Dated this thirtieth day of December, 1948.

Katherine Kernohan, Official Court Reporter in and for Clermont County, Ohio.

CERTIFICATE

I, Katherine Kernohan, the duly appointed, qualified, and now acting court reporter in and for Clermont county, Ohio, and the Common Pleas Court of said county, hereby certify that at the hearing of this cause in the Common Pleas Court of Clermont county, Ohio, it was agreed by all counsel representative of the respective issues involved in this cause, that, all exhibits used in and for the hearing in the Common Pleas Court of Hamilton county, Ohio, be exhibited here in this hearing and, the marks of exhibition indicated thereon be used likewise in this hearing and for the information of this court.

I further certify that, as the official court reporter, I have attached the aforesaid exhibits to this bill of exceptions according to law, and made the same a part hereof.

Dated this thirtieth day of December, 1948.

Katherine Kernohan, Official Court Reporter in and for Clermont County, Ohio.

[fol. 105] IN THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO

TRANSCRIPT OF PROCEEDINGS

At Hearing on Motion to Quash Service of Summons, Monday, May 26, 1947.

STATEMENT BY MR. LONG

Mr. Long: If the court please, this matter this morning is here on a motion to quash on behalf of the Benguet Consolidated Mining Company, one of the defendants in this case. As the motion indicates, we are here solely for the purpose of the motion, and not in any way entering our appearance for the purposes of the trial on the merits.

I think your Honor should have something of the background of this situation, in order that you will understand some of the evidence which we wish to present in support of the motion.

If the court please, some years ago the plaintiff in this case and her husband got into marital difficulties in the Philippines, and a suit was filed by the plaintiff against her husband, to determine property rights and for separate maintenance. It was set forth and appeared that there was a certificate, or certificates of stock in the aggregate of 24,000 shares, which were in the name of the plaintiff in this case, and as a result of that litigation the Philippine courts decided that because of alleged assignments which the wife had made to the husband, this stock, the 24,000 shares of stock, at least the possession [fol. 106] and ownership of them was decreed to be in the husband, on the theory that under the law of the Philippines that was community property.

Mrs. Perkins, for safekeeping or for reasons of her own, took these 24,000 shares of stock and had them on deposit in a bank in New York. The Philippine case went back and forth from time to time, and after Mr. Perkins, the husband, had a decision in the Philippine courts in his favor with reference to this stock, went to New York where it was located, and filed a suit there against his wife, and against this bank, and that case

went clear through the court of last resort of New York. The New York court decided that the Philippine court had no jurisdiction; that there was more or less fraud in connection with the way Mr. Perkins is alleged to have conducted himself with reference to his wife; in any event, the New York court decided that these 24,000 shares of stock belong to Mrs. Perkins.

In the meantime, this company had issued a two hundred per cent increase in stock, and then subsequently a hundred per cent increase in stock, so that the 24,000 shares of stock became 144,000 shares of stock. Mrs. Perkins got, by the New York decision, the 24,000 shares, and after that decision she went out to California and filed a suit in California.

It appeared that this mining company had large sums of money in California for the purpose of making purchases of supplies and machinery for the purpose of maintaining operations in the Philippines; Mrs. Perkins filed suit out there on that New York judgment, and she recovered a little in excess of $500,000 in dividends [fol. 107] on this stock. She attached their funds out there, and that money was paid, the New York judgment was paid.

Now in the meantime, if the court please, the Philippine decision between Mr. and Mrs. Perkins had gone to final judgment, and the Philippine Supreme Court had decided that both the New York and California courts were wrong, and they have rendered a judgment against this company out there, holding that this stock belongs to Mr. Perkins. The Philippine courts have acted, and a judgment is about to be entered, in which they are going to ask this company to pay that dividend another time, to Mr. Perkins. So we are here on a petition which I must read to your Honor, and this is a suit in which Mrs. Perkins in seeking now to have this court say that the 120,000 shares of this stock—she has the 24,000 shares, and this increase has brought out that it is now 144,000, and by subtraction this leaves 120,000, and she is now in this court asking the court to say to this company, the Benguet Consolidated Mining Company and Mr. John W. Haussermann the president of the company, and the First National Bank of Cincinnati, or all three of them, that

they shall transfer these 120,000 shares of stock to her name.

The Court: The increase from 24,000 to 144,000 shares was in the nature of stock dividends?

Mr. Long. That is right. The one increase gave two for one, and the other a hundred per cent increase, and it has been built up until it amounts to 144,000 shares, but she has the 24,000.

(Petition read to the court.)

Now if the court please, we filed a motion to quash not only the service and return of the sheriff in the original, but [fol. 108] in the matter of the alias summons and return thereon in this court. We shall present three points on this motion, and I might say we have prepared a trial brief which we shall be very happy to give your Honor, which we think contains all the authorities and the salient facts necessary to a decision on this motion.

In the first place, the evidence which we shall present will show in this case that this company was organized in the Philippine Islands in 1903 under what is known as the code of commerce in the Philippines. We have the Philippine law here in volume form, and are going to offer it in evidence if there is any question about the law of the Philippine Islands. We will show your Honor that under the law of the Philippines there were three methods by which an association of people could get together for the purpose of conducting a business.

My first point is that the mining company, one of the defendants, is a foreign corporation;

The second point is that if it is a foreign corporation, which we think it is, was it doing business in Ohio? We say it was not doing business in Ohio; and

The third point, if it was doing business in Ohio, was service on John W. Haussermann as president and general manager a valid service? Those are our three points.

The evidence will disclose that in all respects under the Philippine law, a sociedad anonima is exactly the factotem of a corporation as we know it in the United States, and under the English law.

The evidence will disclose that three years after the formation of this mining company—we will show your Honor

its charter, how it was organized, and we will show your Honor that three years later, in 1906, a corporation law [fol. 109] was enacted in the Philippines, whereby a company that is called sociedad anonima, that such an organization is in all respects a corporation; that it continued after the enactment of the new law as a corporation, and that its Spanish name is synonymous, for all purposes, with the corporate existence as we know it in this country.

If the court please, on our second proposition, we call your attention to General Code 11290, which we have set out with reference to service, and that code says, as to service on foreign corporations:

> "When the defendant is a foreign corporation having a managing agent in this state, the service may be made upon such agent."

In other words, if the court please, it is our contention, and the evidence will disclose, that Mr. Haussermann, the president of this company, came to this country in 1941. He was out there continuously as president of this company; he came on a visit in 1941, and I believe he got here some time in May. He lives, and always has lived when he came to the United States, at New Richmond, Ohio, on a farm that he had, or where he lived from the time of his birth. We will show that he was here on a vacation, and had some personal matters of his own which he wanted to take care of—he was combining a little pleasure and business, and then in September of 1941 he was ready to go back to the Philippines. The evidence will disclose that he attempted to get passage on several boats, but that the Japanese war situation was becoming very acute, and every time he got passage on a boat the Government said he could not go, that they needed the boat for other purposes [fol. 110] than hauling people like Mr. Haussermann back to the Philippines. That went on, and as your Honor knows in December, 1941, came Pearl Harbor, and Mr. Haussermann has been at New Richmond living on his farm ever since. The only thing the evidence will disclose—it will disclose that the Japanese got onto this island and simply destroyed this mine, the machinery and everything in connection with it. Not much could be done until after the

war *indeed*, at least until the American forces got back into the Philippines, and from that time to the present the agency out in California has been attempting to buy and replace new machinery, which is rather difficult, and when they made a purchase or negotiated for purchases in order to try to get the mine started again, where the seller of any of those commodities insisted on it, and we had to have an official sign such papers, they were sent to Mr. Haussermann here at New Richmond and as an official of the company he signed it, but he exercised no judgment about the matter, but was a necessary party as an official of the company.

No business has ever been conducted by him on behalf of this concern, and the evidence will so disclose; so that Mr. Haussermann, the evidence will show, was not a managing agent, and we cite the authorities in support of this view. He was not a managing agent in the sense or for the purpose of the application of General Code Section 11290, and—

The Court: May I ask a question? Will the evidence disclose anything about who has authority to order stock transfers?

Mr. Long: Yes, your Honor, the evidence will disclose that the whole management of this concern is conducted [fol. 111] in the Philippine Islands, in Manila. That was our next proposition on the evidence. That has to do with the function of the First National Bank of Cincinnati.

The evidence will disclose—we will have somebody here from the First National Bank—that all they have is a list of cards which cards have the names of owners of the stock in this corporation. Since the war it has been very difficult—it is alleged in the petition, and this is accurate, there are twelve million shares of outstanding stock all over this country. People wanting to transfer it had a great deal of difficulty, writing to the Philippines, to the office, particularly during the war years, and right now you have difficulty getting communications to and from the Philippines, and the company, for the convenience of its stockholders, Mr. Haussermann went down to the First National Bank which was close to where he was living, and the First National Bank does not have the stock book, but as I say it has these cards. When a stockholder comes in and wants

to transfer, or someone comes in with a share of stock which has been assigned and wishes it transferred to his name, he comes to the First National Bank and the First National Bank records that fact on one of these cards and the bank proceeds to negotiate with the Philippine authorities, and it takes an awfully long time before that stock is transferred on the books of the company which was located in the Philippine Islands.

That is the only function, if the court please, which is performed by the First National Bank.

As I say, your Honor please, our third point is, if the defendant was doing business in Ohio, which we do not think your Honor will ever have to get to this point, was [fol. 112] service on Haussermann as president and general manager a valid service as a managing agent?

As I say, your Honor, we will disclose in the evidence that he is not such managing agent, and we do no business in the state of Ohio, and have never done any business here.

The chief function, or the sole function of the company is mining gold and silver, and I believe the charter permits them to go into the lumber business. I understand in mining operations particularly in this location, in order to shore up trenches and certain things necessary in mining operation you need a great deal of lumber, but their primary function is mining gold and silver, and the sale of it, and most of this gold and silver which they mine has been by requisition of the United States Government sold to the United States Government for the purpose of minting money and the like.

As I say, Mr. Haussermann does nothing except he is here on a visit, and is forced to be where he is, and but for the war he would have been in the Philippines, and we think under the law of the state of Ohio they have not gotten service on this defendant the Benguet Consolidated Mining Company, and that this motion should be granted.

STATEMENT BY MR. SCHERER

Mr. Scherer: If the court please, Mr. Long has given to your Honor a brief statement of the previous history of litigation between Mrs. Perkins and Bengnet Consolidated Mining Company. His statement is substantially correct

with reference to that litigation. There are some points on it that we differ about, and of course it is incomplete, [fol. 113] and your Honor in all probability—although it does not affect this particular matter before your Honor, would want to familiarize yourself with that history, and rather than make a statement concerning that previous litigation, may I suggest that your Honor, and perhaps your Honor will want, to read the two decisions to which Mr. Long referred. The one is Perkins v. Guaranty Trust Company of New York; that was decided by the Court of Appeals of New York and reported in 8 N. E., 2d, 849, or in 274 N. Y., 250. The other case, Perkins v. Benguet Consolidated Mining Company, is reported in 55 Cal. App., Section 720. The Supreme Court of California denied the appeal and the Supreme Court of the United States twice denied certiorari. Those citations are 87 Law. Ed., 1721, and 88 Law. Ed., 845.

The Court: That is by the Supreme Court of the United States?

Mr. Scherer: That is right.

If the court please, if agreeable to the court counsel for the plaintiff would like to reserve its right to make a complete and detailed statement of its position relative to the issues raised by this motion at the time we are in a position to present evidence in support of that position.

As previously explained to counsel and the court, we have requested documentary evidence from the Philippines and from California; as yet we have not received that evidence, and in some degree that statement will depend upon the nature of that documentary evidence when it arrives. [fol. 114] Briefly, however, our position is this, your Honor please: As stated in the petition filed by the plaintiff in this case, the defendant is a sociedad anonima, permitted to be organized under the laws of the Philippines. Sociedad anonima when translated means partnership. This defendant is not a corporation under the Philippine law. The Philippine Islands have a corporation act, and they had it a long time, since 1906. It has been amended from time to time since that date, and that corporation act today is almost identical with the Ohio corporation act; and hundreds of corporations have been granted

charters in the Philippine Islands under that act from the government of the Philippines.

One of those corporations is a subsidiary of Benguet, which will be mentioned later, Balatoc, a subsidiary of Benguet. This is a corporation organized under the Philippine act.

We feel that those corporations organized under that act are corporations as defined by the Ohio law as being foreign corporations, and therefore controlled by the laws and rules regulating service in Ohio on foreign corporations, and that this sociedad anonima does not come under that classification, and therefore we feel that they have been properly served in this case.

The Court: I know nothing about this case, but am trying to get your position. If the court should conclude that this is a corporation, do you still claim that you have valid service, or is your position based upon the proposition that this is not a corporation and therefore——

[fol. 115] Mr. Scherer: Our position is that it is not a corporation. While we claim that it is also doing business in Ohio in itself, that this is not a foreign corporation as defined by Ohio law. We claim, and will contend if necessary, that this company, whatever your Honor should decide, has done and is doing business in the state of Ohio.

Mr. Long: At this time there are no counter-affidavits filed to our affidavits, your Honor, and I just want to ask counsel whether or not there are any affidavits which they are filing in this case. I think we are entitled to know that. As I understand the procedure, our affidavit, undenied except Mr. Scherer's statement that subsequent to this time, when they get some documentary evidence from the Philippines, that they wish to offer that as evidence in opposition to any evidence which we offer, but if there are any affidavits which are to be filed, that are prepared for filing at this time, we think they should be filed, and that we should have the benefit of that evidence.

Mr. Scherer: If the court please, counsel have discussed this matter. It is the theory as I understand it of Mr. Long, that the filing of this affidavit by them throws the burden upon us to go ahead. That is not our feeling in the case. We have an affidavit, and if the court should rule with Mr. Long we will be glad to file it. It is our feeling

that we made certain allegations under oath in our petition, the return of the sheriff in this case shows valid service, and the burden now is upon them. They are trying to set [fol. 116] aside the service, and the burden is on them to go ahead. If we are wrong we will file a cross-affidavit, because these men are here from Washington and we have agreed to proceed with their case and their evidence this morning.

The Court: Service has been attempted, on which the sheriff has made a return. Prima facie that is a valid service of summons. The defendants have filed a motion to set aside the service and quash the service. They have a right, and the court understands that both parties desire to offer evidence, whether that evidence be in the form of affidavits or oral testimony in open court. There is an affidavit, or a copy of an affidavit filed with the copy of the motion to quash.

The court does not understand, Mr. Long, that that shifts the burden of proof. You have a right to introduce any evidence, and all evidence you want in support of the motion you filed to quash; after that is done, it is the duty of the plaintiff to offer evidence if they desire, or submit the matter without evidence, on the return of the sheriff.

Mr. Long: I think that under the agreement we had with counsel, that we were to go ahead and produce our evidence, and when he comes in and says he has received whatever it is he has sent for, that he is then to offer his evidence, and I think under that agreement, your Honor is correct. So we shall proceed, if agreeable to the court, to put on our testimony.

[fol. 117] And thereupon counsel for the defendants, on their motion to quash service of summons, offered the following evidence:

JOHN W. HAUSSERMANN, being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Long:

Q. Will you state your name, please?

A. John W. Haussermann.

Q. And what is your residence, Mr. Haussermann?

A. Pierce township, Clermont county, Ohio.

Q. I will ask you to state how long you have lived at this residence in Clermont county.

A. Well, I acquired—it is a farm on which I was born. It was in the family and I acquired from the family in 1906 I think. I have lived on it—every time I come back from the Philippines I usually stay there.

Q. And Mr. Haussermann, would you be good enough to tell the court when you first went to the Philippines for business purposes?

A. I went in the Spanish-American War in 1898.

Q. If Judge Stewart were here he would have that date in a minute—1898, at the time of the Spanish American War?

A. I went in the Spanish-American War as an officer in the 20th Kansas Volunteers. I was practicing law.

Q. As a result of that did you stay in the Philippines, or come back and go back there? Just give us a history of your movements.

A. Well, we landed, the 20th Kansas of which I was an officer, landed in the Philippines in November, 1898. The insurrection broke out there in February 1899, and of course we were engaged there until September 1899 when [fol. 118] our regiment was sent home, and other regiments took our place; but I was not permitted to come home. General Otis, the commanding general, had some legal work for me to do there, and it was not finished, and he held me there until it was finished, and the result was that I was held there permanently.

Q. And Mr. Haussermann, were you admitted to the bar at that time?

A. I was; in the United States?

Q. Yes.

A. Oh yes; I was a member of the bar of the state of Ohio, graduate of the Cincinnati Law School, graduated in 1889.

Q. When did you first become interested in this mining operation in the Philippines?

A. Well, after I served with the army. Judge Taft came over there as head of the commission, and I took part

in the organization of the civil government, became city attorney of Manila, and subsequently assistant attorney general of the Islands. Then in 1903 the international law firm of Coudert in New York City established an office out there, and I became a member of that firm, and resigned as assistant attorney general.

Q. I will ask you to state if you had anything to do with the formation of Benguet Consolidated Mining Company, one of the defendants in this case.

A. Yes. When I commenced to practice law out there, a man named Clark, M. A. Clark, and grubstaked some miners, and he was a client of our office, and I organized the company for those persons who were interested in those mining claims.

Q. Now Judge, I want to ask you whether or not you are familiar and were familiar, with the corporation law [fol. 119] of the Philippine Islands in 1903?

A. There were no corporation laws in the Philippine Islands in 1903.

Q. But you were familiar with the general laws, I take it, with reference to the organization of this company?

A. Yes.

Q. And suppose you tell his Honor what you did in that connection.

A. Well, when it became necessary to organize the company there under the Spanish code of commerce, there were three or four ways of organizing commercial organizations; one was general partners, limited partnership, and then there was one most nearly our idea of a corporation law, that they called sociedad anonima. That—four or five persons could join into an association, issue shares of stock, the shareholders named the board of directors and the board of directors named the officers, and it came nearest to a corporation that I knew of.

Q. Was this sociedad anonima a partnership, or a partnership association, or anything like that?

A. Well, the Americans had a great deal of trouble with translating just what it meant. Some translated it as an anonymous partnership, and some as an anonymous association, and some as an anonymous society. It was a commercial organization which had a legal entity, and to all

intents and purposes was organized along the lines of what we understand as a corporation. But it was called and known as a sociedad anonima.

The Court: Did any shareholder have the power to terminate the existence of that society, or apply for a receiver?

A. They had no power to liquidate it until it ended, but of course if they were in violation of law——

[fol. 120] The Court: I understand that, but it was not a situation where two men are in partnership and one wants to dissolve——

A. Oh, no. They were controlled just the same as a corporation is here.

Mr. Long: Mr. Scherer, you have a certified copy of the Articles of Incorporation which are in Spanish, and I have a translation of the same which we would like to have you agree is a translation. The judge has gone over it and reports that it is correct.

Mr. Scherer: I assume that it is. I have the official translation here, certified by the Securities and Exchange Commission.

Mr. Long: We offer the certified copy and its translation for the benefit of the court. I will state professionally that this translation is an exact translation of the original Article of Incorporation of this company. We offer in evidence a certified copy of the Articles of Incorporation with the translation.

The Court: That may be admitted as Exhibit 1.

Said certified copy of Articles of Incorporation Benguet Consolidated Mining Company, together with a translation of same, having been admitted in evidence by the court, was marked Exhibit 1, is hereto attached and made part hereof.

By Mr. Long:

Q. Mr. Haussermann, directing your attention to Exhibit 1; I notice in the translation of these articles that the translation which you furnished us under Item 11 does not appear in the translation in the certified copy. Could you explain that to the court?

A. What's that?

[fol. 121] Q. This article, "Liability of each stockholder of this company shall not exceed that of the capital contributed by him as soon as it is paid".

A. What is the question?

Q. I say, apparently that paragraph I just read you is not in the translation of the articles which have been offered in evidence.

A. I don't know. I did not make the translation. I don't know why it was eliminated.

Q. Now can you translate the original Article 11, that is the Spanish Article 11? Will you translate that?

A. It has been so long since we used Spanish, I think I have forgotten it all. I will try it and see.

Mr. Scherer: Your Honor, please, I am going to object to the translation. This is a certified copy of the official translation of the company which was submitted to the Securities and Exchange Commission of the United States under the 1933 Securities Act, for the purpose of selling securities in the United States. This is their official translation, submitted to a governmental agency.

The Court: When he is asked to translate something that is in Spanish, does that make it objectionable? He is translating from that document. Objection overruled.

A. I will have to give a pretty liberal translation. "The responsibility of each shareholder in this company does not exceed that which he apportioned and has paid into the company."—That is a rather liberal translation.

Mr. Long: Now if the court please, a lot of things here there should not be any objection to, and I take it there won't be, but this is a foreign law we are in now, and I believe we have to prove what the law of the Philippines is, and was at the time that this corporation was formed, and we would like, if agreeable to counsel, this [fol. 122] book is in our library upstairs, to offer the code of commerce of Spain. It was the law of the Philippines with reference to this matter at the time of the formation of this company.

The Court: Is that in Spanish, too?

Mr. Long: No, it is a translation. It is the so-called code of commerce under which this company was formed.

The Court: May I ask a question? I want to ask you, will you state, for the purpose of the record, of what court you were a judge in the Philippine Islands?

A. We called it—I can explain it this way: All the courts and everything were destroyed with the coming of the Americans into the Philippines. They were out of existence. For the government of Manila they had what they called the provost guard, and the commanding officer acted as mayor of the city. The judge advocate was the legal adviser. We organized a provost guard where we tried all criminal cases, and I was a judge of that; and then civil matters came along. We had no courts, so I was the judge advocate of the provost guard, and all matters between citizens of a legal nature were referred to me as judge advocate. Consequently I acted as the court. We had lawyers, Spanish and Americans, and they prepared their cases, and I did the best I knew how; and decided the cases. That is the way I got the name of judge, those two different positions—that is under military and under Judge Taft.

Mr. Long: We offer the code of commerce.

Mr. Scherer: There is no objection and I don't suppose after we compare them, this one and ours, that there will be any objection to it?

[fol. 123] Mr. Long: None at all.

The Court: It may be admitted.

Said code of commerce of the Philippine Islands having been admitted in evidence by the court, was marked Exhibit 2, is hereto attached and made part hereof.

Q. Judge Haussermann, I want to ask you if you can tell the court what the official digest of the Philippine Islands is with reference to the law governing the formation of a company?

A. I don't quite catch you.

Q. Is there such a thing in the Philippines as a Philippine Digest, I believe in six volumes?

A. Oh, yes, a digest of the decisions of the Supreme Court of the Philippines.

Mr. Long: We offer in evidence Volume 6 of the Philippine Digest.

The Court: As an aid to the court will you direct me to the page? And also of the code of commerce of Spain, I would like to have the page.

Mr. Long: I shall, your Honor. Section 151 of the code of commerce. In Volume 6 of the Philippine Digest, page 283 in the glossary under the heading Sociedad Anonima is the particular matter.

The Court: It may be admitted as Exhibit 3.

Said Volume 6 of the Philippine Digest having been admitted in evidence by the court, was marked Exhibit 3, is hereto attached and made part hereof.

By Mr. Long:

Q. How many shares are authorized in this company?
A. Twelve million, of the par value of one peso each.
Q. I will ask you if they are all issued?
A. They are.

[fol. 124] Q. Now when Mrs. Perkins filed her suit in California, or the suits that she filed in California, are you familiar with the petitions which she filed in those cases under her affidavit?

A. Yes, in a general way.

Q. I will ask you to state whether she made any allegations as to this defendant being a corporation?

Mr. Scherer: I object.

The Court: Objection sustained. The petition is the best evidence.

Mr. Long: I know, your Honor. We wish to offer in evidence a certified copy of that portion of the petition filed by the plaintiff in this case against the defendant Benguet Consolidated Mining Company, certified by the judge of the Superior Court in which this suit was filed, particularly that language in the petition wherein the plaintiff in this case alleges under oath: Item 1. At the time of the—"At all of the times herein mentioned, the above named defendant was, and ever since has been and still is, a corporation organized, existing and doing business under and by virtue of the laws of the Philippine Islands, and having its principal place of business in the city of Manila, Philippine Islands". We offer the entire

petition in evidence if the court please, particularly with reference to the allegations made by the plaintiff under oath in that petition, in all of which references she referred to this defendant as a corporation.

Mr. Scherer: Do I understand you are introducing only the petition?

Mr. Long: Only the petition. We can't take this apart, because it is a certification of the whole record. We are offering merely the certified copy of the petition filed by [fol. 125] the plaintiff under oath as to the allegations she made as to the character of this defendant.

Mr. Scherer: We have no objection if they are going to introduce all that has been certified to, but we do object to just taking the part of it and introducing it.

The Court: What is the objection, Mr. Scherer?

Mr. Scherer: There is an answer filed by the defendant in this case which we think should be part of the record if they are introducing it. The certification applies to the whole document if I don't think you can pick——

The Court: They have a perfect right to introduce what part they consider competent, and if you consider some other part, when it comes your turn you may offer that. I take it there is no objection because the petition is not separated from the rest of the record, is there?

Mr. Scherer: We will withdraw the objection.

The Court: There being no objection on the part of the plaintiff because the petition is attached to other parts of the record, it may be admitted as Exhibit 4.

Said certified copy of petition having been admitted in evidence by the court, was marked Exhibit 4, is hereto attached and made part hereof.

Mr. Long: We offer certified copy of second amended complaint filed in Case No. 325834 in the Superior Court of California. The number of the first case was 278792, and this is the second amended complaint in 325834 in the same court, and that part of the certified copy with reference to plaintiff's allegations as to the character of this defendant. The date of the filing of the second amended complaint was August 24, 1945.

The Court: It will be admitted as Exhibit 5.

[fol. 126] Said certified copy of second amended complaint in case No. 325834 in the Superior Court of California having been admitted in evidence by the court, was marked Exhibit 5, is hereto attached and made part hereof.

By Mr. Long:

Q. Will you be good enough to tell us who is the president of this company?

A. Myself, John W. Haussermann.

Q. And the secretary?

A. Miss Rose McKee.

Q. Where does she live, Mr. Haussermann?

A. In Leavenworth, Kansas, at the present time.

Q. Do you have any vice presidents?

A. Yes.

Q. Who are they?

A. My son, Francis O. Haussermann, is the vice president.

Q. Where does he live?

A. Dayton.

Q. And who is the other?

A. We haven't any other vice president just now.

Q. Who is J. S. Peterson?

A. Chief of staff; and he signs himself in the Philippines sometimes as vice president.

Q. And who is the treasurer?

A. Miss Rose McKee.

Q. And that is the same lady who is secretary?

A. Yes.

Q. And do you have any other official? Do you have an assistant secretary?

A. Yes, in the Philippines; Mr. Albert.

Q. He resides in Manila?

A. Yes, sir.

Q. Would you be good enough to tell his Honor who constitutes the board of directors?

A. Myself; Francis O. Haussermann, John W. Haussermann, Jr.

Q. Where does he live?

A. Mt. Kisco, New York.

Q. And who are the others?

A. Clyde B. DeWitt, living in Manila, and Miss McKee.

[fol. 127] Q. Where, with the exception of your son, John W. Haussermann, where did these officers and members of the board reside prior to the Japanese invasion? Where were they?

A. Well, we all lived in the Philippines then excepting John W. Haussermann, Jr. He was not a member of the board at that particular time.

Q. And who of the board are in the Philippines now?

A. Only one, Mr. DeWitt.

Q. And did he ever return to the United States?

A. No.

Q. He was interned, I believe?

A. He was interned.

Q. Did Miss McKee come back to the United States?

A. After she was released from internment in 1945.

Q. How long was she interned?

A. They all were interned thirty-seven months.

Q. And when accommodations are available is she going back do you know, to the Philippines?

A. No, I don't think she is going back.

Q. Now how about Francis Haussermann; did he live in the Philippines?

A. Yes.

Q. How long?

A. Oh, he was born in 1906, and came over there when he was two years of age, and lived there, excepting the times when he came here to go to school, and then I think he left in 1940 and did not go back there, and has not been back there since.

Q. He is the young man that is in Dayton?

A. Yes.

Q. Why was he put on the board?

A. Why?

Q. Yes.

A. Oh, he has been on the board for a number of years.

Q. Was there any point in having him on the board, living in Dayton?

A. He has never been taken off the board.

[fol. 128] Q. Now about yourself; how long did you stay

in the Philippines—I mean before the Japanese invasion, how long were you in the Philippines?

A. Well, as I say, I went there in 1898, and was there until 1915 excepting when I made occasional trips here on vacations; first as an army officer, second as a government official, and then as a practicing attorney; and in 1915 I tried to retire, and came back here. I had promised my wife in 1910 that I would retire from the Philippines in 1915. When 1915 came along I got interested in rehabilitating the Benguet Consolidated Mining Company which had had reverses, and I came back in 1915; thinking that I would retire and remain here.

Q. Did you remain here?

A. But I was called back there in 1915, every year after that, and then Mr. — who was then president Mr. Beam, and general manager, became ill, lost his health, and the board of directors selected another man to take his place. He served for two years and it was not quite successful, and the result was that I had to go back, and assume the management of the company. First I did it as vice president, because Mr. Beam was ill, but he finally had to give up and I assumed the presidency.

Q. When did you go back in 1915?

A. Well, I got back here in 1915. I left there in September of 1915, and went back again in the beginning of 1916,—no, wait a minute—yes, I left there in 1915—I am trying to get these dates.

Q. In any event, after you went back there did you stay continuously except as you came back for visits?

A. Between 1915 and 1929 I was trying to retire, but [fol. 129] in 1927 I found I could not retire. I had to go back, and did go back in 1928, I think it was, or 1929, and have been there ever since.

Q. Then I believe that, coming down to 1941 in the late spring, you came back to the United States for a visit?

A. 1941—yes, I left there the latter part of April 1941.

Q. I will ask you to tell his Honor whether you came back here at that time on any business for this mining company?

A. We had no business here.

Q. That was a personal visit, was it?

A. Personal and to visit my—my family was here. I had my reservation and transportation back on the President Coolidge, to go back in September 1941, but I received notice the government had taken all space on that boat, and they would put me on the October boat. October came around and the same condition existed, and they promised the November boat. The same condition. Then in December things happened, December 7 was Pearl Harbor, and I have been here ever since, could not get back.

Q. Were you engaged in any other business in the Philippines in 1941?

A. Oh, yes.

Q. Just tell some of it, will you, to the court?

A. I was then, and am now, president of the People's Bank & Trust Company.

Q. In Manila?

A. In Manila. And president of the Heald Lumber Company, in Manila; president and general manager of Balatoc Mining Company, in Manila; president and general manager of the Benguet Consolidated Mining Company. Here in the United States I am president of the New [fol. 130] Richmond National Bank, and a director of the First National Bank of Cincinnati. I think that covers my activities.

Q. Were you connected with the chamber of commerce in Manila?

A. Oh, yes.

Q. A member, are you?

A. Oh, yes.

Q. And what other concern—how about the chamber of mines?

A. I am head of the so-called chamber of mines there in the Philippines.

Q. What is the business of the Benguet Consolidated Mining Company?

A. Exclusively in mining gold and silver in the Philippine Islands; and in addition to that we have on two occasions entered into what I call profit-sharing contracts with other companies, especially chrome companies. There is quite a deposit of chrome there, and they appealed to us, and we finally undertook to develop that company for

them on the profit-sharing basis. We do not own the property, but have an operating contract.

Q. Where did the defendant in this case conduct that?

A. In Zambales Province, Island of Luzon.

Q. Ever done any business in Ohio?

A. Never; or in any other state in the United States.

Q. Has your company ever sold any gold, silver, chrome or lumber in the state of Ohio?

A. No. All our chrome is sold right there in the Philippine Islands.

Q. Has your company sold any gold or silver, or produced any, since Pearl Harbor?

A. No.

Q. And the sales that are made by this company, where are they made?

A. Of the gold?

Q. Yes.

A. If you call it sales——

Q. Well, I mean prior—you haven't made any since Pearl Harbor, but prior to that where were they made? [fol. 181] A. All of our gold we shipped to the United States Mint in the form of what we call bullion.

Q. And what is that—f.o.b. the Philippines?

A. No, we mail it direct to the mint by first-class mail, registered.

Q. Is there any law that you know of that dictated where you should sell gold and silver?

A. Oh, yes.

Q. What was it?

A. Ever since 1933 nobody was allowed possession of any gold for more than three days. All gold in the possession of any individual or company had to be turned over to a national reserve bank, or to the mint if it was in the form of bullion, which we did.

Q. That was after Roosevelt——

A. I think it was in 1934. When we went off the gold standard, whenever that was.

Q. Will you tell his Honor if you are in the state of Ohio on business of the company, or how you happen to be here?

A. I built a home, in 1937 or '38 on my farm, and it is

about the only natural place for me to go, and I came to my boyhood home in Clermont county.

Q. Will you tell his Honor, but for the war would you be in the Philippines?

A. Oh, no doubt about it.

Q. You were not sent here by the board of directors on any business by your company were you?

A. No, no.

Q. And is your company keeping you here on any business of its own?

A. No. I am trying to get back. I finally have gotten reservations to go back.

Q. Do you have any reservations at the present time for going back to the Philippines?

A. Yes, I have reservations on the steamer "Cleveland"; tentative sailing date they tell me is August 29. It is the first boat that I could get exclusive cabin privileges.

[fol. 132] Q. When did you begin making these reservations to go back to the Philippines?

A. Oh, I was there on the West Coast in January and took it up with them, and I have been talking informally with them when they would get ready to re-establish transportation to the Philippine Islands, in 1945, the latter part of 1945 and '46.

Q. Now what connection—I mean what if anything have you done on behalf of the company, tell us in a general way, since you have been in New Richmond?

A. Well, when Pearl Harbor took place we had bullion accumulated in the Philippine Islands, which we turned over to the military authorities at Corregidor for safekeeping that had not been shipped. When the military authorities saw that Corregidor would have to fight, the bullion gold they had, not only of our company but other companies and the banks, they tried to avoid it getting into the hands of the Japanese; so a submarine came in and took out that gold, part of which was our bullion. That finally came to the mint and was in the hands of the government of the United States, and ultimately they turned the cash value of that to me, and it was deposited to our credit at the bank in San Francisco. We had quite a bank balance too in San Francisco when the war started. When the war started there were lots

of our goods en route, supplies, and when the war started some of the boats went to neutral points, some went down to Australia, and some was sunk by the submarines; so I was the only one that was here, and I did what I could to gather together this stuff that was at this port and that [fol. 133] port; called attention to the loss of the dynamite by a ship that went down, and that insurance was finally paid and put there in San Francisco. I had to conserve that property that was scattered all over the West Coast, and I did that.

Q. In connection with that, did you make any deposits in any of the banks at New Richmond?

A. Not at that time. As soon as the American-Japanese war started, all funds belonging to any company within any occupied zone was what we call blocked off.

Q. Frozen?

A. Well, some call it frozen, but I think the government calls it blocked.

Q. And this was treated that way because you were a foreign corporation?

A. Yes, and ours was blocked.

Mr. Scherer: I object.

The Court: The fact that the deposit was blocked may remain in the record; the cause may be stricken out.

By Mr. Long:

Q. Now, Mr. Haussermann, do you maintain an office anywhere in the state of Ohio?

A. Well, I suppose you could call—I always had a loafing place when I came on my trips, but at the New Richmond Bank I have an office there.

Q. Is that an office of this company, or your personal office?

A. Oh, no, it is my office. I am president of the bank there, and have personal business, and an office there of course.

Q. Representing some of these other concerns in Manila, you did some business for them, did you?

Mr. Scherer: I object. He is doing a little too much leading.

The Court: The form is bad. Objection sustained.

[fol. 134] By Mr. Long:

Q. Now does the Benguet Consolidated Mining Company maintain any office in Ohio, or any place else in the United States?

A. No, sir.

Q. Where is the bookkeeping of the company done?

A. Now it is being done in the Philippine Islands, assisted by the ex-auditor who is in Oakland, California. He helps; he is our ex-auditor.

Q. Does Mr. Mercier, your general counsel, have anything to do with the bookkeeping, in Washington?

A. He did while they were all interned; he kept track of receipts and disbursements.

Q. What about the purchase of machinery and supplies, where is that handled from?

A. That is all done by requisition from Manila. It is sent to Mrs. Baumann in San Francisco, who prior to that was the clerk of a purchasing agent we had there prior to the Japanese war. He died, and Mrs. Baumann was familiar with things, and our suppliers, and the requisitions were sent to her in San Francisco. She would get in touch with the suppliers and purchase the things and then issue the orders as directed by Manila, and then the purchasers usually required an officer to approve the orders, and I signed them, sometimes in Ohio; sometimes I was on the West Coast, sometimes in Washington, or New York, wherever they happened to be sent to me.

Q. What about this transfer agent, the First National Bank at Cincinnati; when did that occur, and tell his Honor about that.

A. Well, of course during the war when the Philippines were in the hands of the Japs, there was no way to communicate. We have ma-y shareholders in the United States that want to dispose of their shares; it was a nuisance; they could not send them out there, and could not communicate [fol. 135] with them. So, as we went on and the shareholders increased quite extensively, it would cost money to send things out there, the time and insurance, and finally I was induced to open a transfer office here in the United States for the convenience of the United States shareholders, which I did by designating—or the board of direc-

tors did—the First National Bank here for the convenience of the shareholders. The Benguet has not had a single share to sell, or that was not outstanding, since 1913. We have now about ten thousand shareholders.

Q. When did you make that arrangement with the First National Bank?

A. Oh, it was under discussion for some time. I don't know just when the actual board of directors authorized it.

Q. Well, if I tell you that I have a certification here on the subject, and it is around in January 1946, would that refresh your recollection?

A. Well, that's it; I know it was in 1946 some time.

Q. This is the certification I referred to?

A. It appears to be.

Mr. Long: At this time we would like to offer in evidence, a certification as to the authority of the First National Bank of Cincinnati, with reference to acting as transfer agent for this defendant company.

Mr. Scherer: We have no objection.

Mr. Long: We offer this certification by the vice president and assistant general manager of this defendant company, showing the resolution of the board of directors as to the appointment of the First National Bank of Cincinnati, Ohio, as transfer agent in this city.

The Court: It may be admitted as Exhibit 6.

[fol. 136] Said certification having been admitted in evidence by the court, was marked Exhibit 6, is hereto attached and made part hereof.

By Mr. Long:

Q. Does the First National Bank have your stock book? Where is your stock book?

A. In the Philippine Islands, if I understand you rightly.

Q. What do they have as a register of the stockholders?

A. They will have to answer that. I don't know. I did not look into—they have our authority as our transfer agents, and they keep tab, but what the mechanism is I don't know.

Mr. Long: You may cross examine.

Cross-examination.

By Mr. Scherer:

Q. Judge, in the affidavit which you filed in this case in support of the motion to quash, you state that the sociedad is a Philippine equivalent of an American corporation, and is interchangeably referred to as a corporation or sociedad anonima. That is what you said, isn't it?

A. Certainly; that is true.

Q. Now Judge, in the case of Indonah Slade Perkins versus Benguet Consolidated Mining Company, No. 278792 in the Superior Court of the state of California, you testified in that case, did you not?

A. Yes.

Q. And you also gave a deposition in that case prior to testifying?

A. I did.

Q. And that deposition was taken, was it not, on Monday, June 5, 1939, in the office of Pillsbury, Madison and Sutro, 2024 Standard Oil Building, 225 Bush street, San Francisco?

A. I don't know the place, but I assume that is correct.

Q. You recall it was taken in their office?

A. Yes.

[fol. 137] Q. And Pillsbury, Madison and Sutro were your attorneys at that time?

A. The company's attorneys.

Q. I believe also you were represented at that time by Francis R. Kirkum and W. H. Lawrence?

A. Kirkum was a part of the Sutro firm; Lawrence was independent.

Q. Well, W. H. Lawrence was one of the counsel for the defendant Benguet Consolidated Mining Company?

A. He was in that case.

Q. Now Judge, I am going to ask you whether or not you remember, under questioning by Mr. Lawrence, the following questions being asked with reference to the matter now at hand—that is the nature of a sociedad anonima, and whether or not you gave the following answers, on page 4: Question: "Is the defendant company a corporation?" Answer: "No; it is what we call in the Philippine Islands a sociedad anonima". Do you recall that question being asked, and that answer given?

A. I do.

Q. Did you give that answer?

A. I did.

Q. And the next question: "When was it organized?" and answer was: "In June 1903". Was that question asked and that answer given?

A. It was, as I recollect.

Q. Then another question: "What law in the Philippine Islands governs the organization of such a company?" and the answer was: "It was organized under what is called the code of commerce of the Philippine Islands". Do you recall that question being asked and that answer given?

A. That is true.

Q. That question was asked and that answer given?

A. Yes, sir.

[fol. 138] Q. And the next question: "Now is sociedad anonima under the Philippine law a judicial entity? Answer: "Yes, sir."

A. That is true.

Q. That question was asked and that answer given by you?

A. Yes.

Q. The next question: "What is the most convenient equivalent in English terms for a sociedad anonima?" and the answer to that was: "I consider it in my own mind the nearest to it that I can understand is a limited partnership". Did you give that answer to that question at the time?

A. That was my personal opinion. Unfortunately the courts do not agree with me.

Q. You say the courts do not agree with you?

A. No; we are always called a corporation.

Q. You say the Philippine courts do not agree with you?

A. They always call us a corporation, and they usually say sociedad or corporation. When that was organized there was no such thing as a corporation there, and we didn't know what to call it, and we called it sociedad.

Q. Now Judge, you filed with the Securities and Exchange Commission of the United States from time to time certain statements of registration under the Securities Act of 1933, together with certain exhibits, did you not?

A. Yes.

Mr. Scherer: I would like this certified copy from the Securities and Exchange Commission marked for identification, if the court please.

(Same was marked for identification "A".)

Q. I believe, Judge Haussermann, you signed all of the registration statements, did you not?

A. I signed all that I had to; whether all were signed or [fol. 139] not I don't know, but I signed all that required my signature.

Q. And are you familiar with the bylaws of the Benguet Consolidated Mining Company as amended and revised to April 1, 1946?

A. Oh, yes.

Q. Are you familiar with the very first section of the first Article of those bylaws?

A. If you will show it to me I can tell you whether I remember it. I know pretty much the whole of them.—Yes.

Q. That first section of the bylaws to which I have referred reads, does it not: "The capital stock of this anonymous partnership, or sociedad anonima hereinafter referred to as the company, shall be divided into twelve million shares, etc." Does it not read that way?

A. You read it; I think it does. I will read it to you if you let me have it. Section 1 reads as follows: "The capital stock of this anonymous partnership or sociedad anonima (hereinafter referred to as company), shall be divided into twelve million shares of the par value of one peso each. All share certificates shall be signed by the secretary or assistant secretary and countersigned by the president or either of the vice presidents, and sealed with the seal of the company."

Q. Referring to Defendants' Exhibit 1, which is the articles of the sociedad with the English translation, I will show you the certification of the Chief Mercantile Registry Division, and ask you if you have ever seen that before?

A. You mean whether I saw the register or not?

Q. No, whether you have seen this certification.

A. Yes, I think I saw it here on the table, yes, sir.

[fol. 140] Q. And that shows, does it not, that the articles of the Benguet Consolidated Mining Company, a sociedad anonima, have been duly registered in the Mercantile

Register of the Bureau of Commerce, leaf No. 440, folio No. 440, folio 94 of Volume 12, of the Book of Partnerships?

A. That is what it says.

Q. Now you said, Judge, that the courts of the Philippines have said that you are a corporation; you were general manager and president of Benguet Consolidated Mining Company in March of 1933, were you not?

A. I think so. It was just about that time when I assumed the presidency. I think it was in 1933.

Q. You are familiar with the case of Hardin, et al. versus Benguet Consolidated Mining Company, tried in the Philippine Islands that year, are you not?

A. I am.

Q. May I ask you first, you are also president of the Balatoc Mining Company?

A. I am.

Q. That is a corporation organized and existing under the laws of the Philippine Islands, is it not?

A. Yes, it is.

Q. And Benguet Consolidated Mining Company owns approximately sixty-five per cent of the stock of Balatoc, does it not?

A. Something over sixty-four per cent—sixty-four and a half I think, to be exact.

Q. I missed it by half a per cent. And in that case, didn't Harden and others who were minority stockholders of Balatoc, contend that Benguet could not hold stock, or own the stock of Balatoc because under the Philippine law Balatoc was a mining corporation, and that Benguet also being a mining corporation the law prohibited one mining corporation from holding stock in another mining corporation?

[fol. 141] Mr. Mercier: What law are you referring to?

Mr. Scherer: I am asking him.

Mr. Mercier: I think he should specify which law, your Honor, please. That is the Philippine corporation law, is it not?

Mr. Scherer: Yes.

A. First let me correct you. Harden and two others, his employees, were the persons who made that contention. Their contention was substantially as you stated it.

Q. And in that case didn't Benguet contend, and successfully, that it had a right to own the stock in Balatoc because it was not a corporation, but was a sociedad anonima?

A. We contended that, but we were not successful in that particular contention that we had. The courts held that we were entitled to that stock.

Q. Now I am referring again to the statement of registration with the Securities and Exchange—which you filed with the Securities and Exchange Commission of the United States, marked for identification "A", and ask you whether or not you did in that statement of registration, on page 141, which is part of the prospectus filed with the statement of registration, discuss the case to which I have just referred.

A. I don't recall it, but if it was discussed there—I discussed it with many people.

Q. Let's see if you didn't—and this was filed last year, as late as 1946?

A. I know that case was mentioned in that prospectus.

Q. Well, under the heading of "Stockholdings in Balatoc", see if you don't recall this: "As set forth below, registrant owns 64½% of the capital stock of [fol. 142] Balatoc Mining Company, a Philippine mining corporation. Section 13 (5) of the Philippine corporation law provides that a corporation organized for the purpose of engaging in agriculture or mining shall not in any wise be interested in any other corporation organized for like purpose. Certain minority stockholders of Balatoc brought suit in which they challenged the right of registrant to hold stock in Balatoc. The suit was dismissed by the Court of First Instance in Manila on the grounds, (1) that a sociedad anonima created under the code of commerce of the Philippines does not fall within the statutory definition of the term 'corporation', and that the registrant was not a corporation; (2) that the provision of the corporation law prohibiting a mining corporation from being in any way interested in other corporations did not apply to a sociedad anonima; (3) that a sociedad anonima owed its existence and powers to the articles of association of its members, and that neither its right to exist or its powers were derived from the state; (4) that

quo warranto proceedings could not be instituted against it simply because it holds no charter that was subject to forfeiture by the state; and finally (5) that the only party who could inquire into the ownership by the registrant of the stock of Balatoc was the government itself in a direct proceeding instituted by it. The judgment in favor of the registrant was, on March 18, 1933, affirmed by the Supreme Court of the Philippine Islands in a decision, Harden et al. v. Benguet Consolidated Mining Company, which is reported in Volume 58 of the Philippine Reports, page 141, and reference to which is hereby made. The higher court, while not passing on the question of the applicability of [fol. 143] the statute in question to a sociedad anonima, hold that the registrant's right to hold the stock of Balatoc was good against the world and free from attack except in a direct action brought by the government. No action against registrant has ever been brought by the government or any one in its behalf under this statute."—Did you report what I have just read in the year 1946 to the Securities and Exchange Commission of the United States, when you sought to register the securities—

A. That is a true statement.

Q. (continued)— securities of Benguet in the United States?

A. That is substantially true, reporting just exactly what the lower court said, and what the Supreme Court said in the Philippine Islands.

Q. And that was in the prospectus which was filed with the statement on the registration, and made part of the statement. Now in the statement itself, or registration I believe—who prepared this for you Mr. Hausermann, for your signature, the statement of registration?

A. I had two or three lawyers. I think Mr.—I don't know which one, but there are two or three.

Q. Well, Mr. Mercier's name appears—

A. Well, I expect he did then; I don't know.

Q. On page 10 of the registration statement itself, did not the company repeat the finding of the court without referring to the decision, and say the following: "Stockholdings in Balatoc. As set forth below, registrant owns 64½% of the capital stock of Balatoc Mining Company, a Philippine mining corporation. Section 13 (5) of the

Philippine corporation law provides that a corporation organized for the purpose of engaging in agriculture or [fol. 144] mining shall not in any wise be interested in any other corporation organized for like purpose. Certain minority stockholders of Balatoc brought suit in which they challenged the right of registrant to hold stock in Balatoc. The suit was dismissed by the Court of First Instance in Manila on the grounds, (1) that a sociedad anonima created under the code of commerce of the Philippines does not fall within the statutory definition of the term 'corporation', and that the registrant was not a corporation; (2) that the provision of the corporation law prohibiting a mining corporation from being in any wise interested in other corporations did not apply to a sociedad anonima; (3) that a sociedad anonima owed its existence and powers to the articles of association of its members, and that neither its right to exist or its powers were derived from the state; (4) that quo warranto proceedings could not be instituted against it simply because it held no charter that was subject to forfeiture by the state; and finally (5) that the only party who could inquire into the ownership by the registrant of the stock of Balatoc was the government itself in a direct proceeding instituted by it." —Was that contained in the statement of registration itself?

A. You read it; I assume so.

Q. Directing your attention, Judge, further to the prospectus to which I have heretofore referred, and on page 145 of the certified copy of the statement of registration marked for identification "A", I will ask you whether or not the company last year, 1946, less than a year ago reported to the securities and exchange commission the following relative to the articles of association: "The company, as stated above, was organized under the laws [fol. 145] of the Philippine Islands as a sociedad anonima in 1903; and under the provisions of its articles of association its life expires on June 24, 1953. Under the existing general corporation law of the Philippines, the company may apply for a charter to operate as a corporation, rather than as a sociedad anonima, in which event it would have a life of fifty years from the date of the application for the charter. The company has been advised by coun-

sel, Lucien H. Mercier, Esq., that instead of applying for a charter to operate as a corporation, the company could, prior to June 24, 1953, amend its articles of association as a sociedad anonima to extend its life as such a sociedad anonima for an additional fifty years. Said counsel further advises the company that the Philippine corporation law does not permit the formation of any new sociedad anonima because all of the laws pertaining thereto were repealed, excepting that such laws were, by the repealing statute, kept in full force and effect as to any sociedad anonima existing at the time of repeal. The company existed as such sociedad anonima at the time of said repeal. There are no Philippine decisions, however, on this point, so counsel advises the company."—Do you remember that language in your statement of registration?

A. Yes.

Q. Now, Mr. Haussermann, you had to sign the original statement of registration, and also the amendments that were filed, and all of these which I state professionally were filed in the year 1946. Now in that registration you designate yourself as president and general manager of Benguet Consolidated Mining Company, do you not?

A. Which is true.

[fol. 146] Q. And who did you say before was the assistant secretary?

A. Mr. Albert then, and for a while Miss Gordon was assistant secretary, but not now.

Q. This shows that in 1946 Miss Gordon, who is in the court room I believe, was assistant secretary?

A. Yes.

Q. Is she a resident of this country?

A. Yes.

Q. Has she ever been in the Philippines?

A. No, not to my knowledge.

Q. And you say, that "Pursuant to the requirements of the securities act of 1935, this amendment to the registration statement has been signed below by the following persons in the capacities and on the dates indicated." And you signed, John W. Haussermann under title, dated May 1, 1946, president, general manager, principal executive officer, principal financial officer, and principal account-

ing officer; and the issuer's duly authorized representative in the United States.

A. That last I didn't catch.

Q. And the issuer's duly authorized representative in the United States.

A. Well, that is what they wanted me to sign. I suppose that is all correct.

Q. And you also signed as John W. Haussermann, director, and then Francis O. Haussermann signed as director, vice president, and assistant general manager. Where does he live?

A. Near Dayton, Ohio, on a farm.

Q. How long has he been a resident of Dayton, Ohio?

A. Two or three years, I imagine.

Q. And John W. Haussermann, Jr., also signs as a director, does he not?

A. Yes.

Q. And then Rose T. McKee as a director, secretary-treasurer, and all by John W. Haussermann, attorney-in-[fol. 147] fact with respect to all of the above directors?

A. How is that?

Q. All these have been signed by John W. Haussermann, attorney-in-fact, with respect to all the above directors?

A. Oh, yes, I have got the authority to do that.

Q. Now, in the same statement of registration, the securities and exchange commission requires that you list the directors and officers; do you remember that, Mr. Haussermann?

A. Oh, of course; that is the law.

Q. It says: "List the names and complete mailing addresses of all directors and officers of the registrant, and all persons chosen to become directors or officers. Indicate all offices held or to be held by each person named: John W. Haussermann, Pond Run Farm, New Richmond, Ohio, president, general manager and director; Francis O. Haussermann"—what is the name of that farm?

A. Frenanne Farms.

Q. "R. F. D., Dayton, Ohio, vice president, assistant general manager and director; John W. Haussermann, Jr., Mt. Kisco, New York, director."—Was he ever in the Philippines?

A. Born out there.

Q. How many years since he was out there?

A. Five, six, maybe ten years.

Q. He has not been back to the Philippines for about five years before the war was on?

A. He was not a director in those days; just since the war.

Q. And he is now?

A. Yes.

Q. When was the last time he was in the Philippines?

A. I think it was 1937—or—'38 the last time.

Q. When was the last time Francis was there?

A. He left there in 1940.

[fol. 148] Q. "Rose T. McKee, 517 Chestnut street, Leavenworth, Kansas, secretary-treasurer and director. Clyde A. DeWitt, Manila, Philippine Islands."—He is a member of the firm of DeWitt and Perkins, is he not?

A. Yes.

Q. And they are general counsel for Benguet in the Philippines?

A. Mr. DeWitt is.

Q. And Perkins is the husband of the plaintiff in this case?

A. Yes, sir.

Q. And he was at one time on the board?

A. Many years ago.

Q. And was replaced by his law partner DeWitt?

A. No. I don't know by who, but not by DeWitt.

Q. DeWitt is on the board?

A. Yes.

Q. And DeWitt and Perkins today and for many years have been the general counsel for Benguet in the Philippines?

Mr. Mercier: I object. That has no materiality to the question as to whether the company is a corporation or doing business in Ohio.

Mr. Scherer: I will withdraw the question at this time.

Q. You know, do you not, Mr. Haussermann, that the securities and exchange commission requires the company that is seeking the registration of its securities, to desig-

nate who the parent of the company is, and then defines that word?

A. I don't know that.

Q. Do you recall approving this statement in your statement of registration: "John W. Haussermann, president and general manager of the company, is probably deemable under the securities act of 1933 and the rules and regulations of the securities and exchange commission thereunder, as parent of the company by virtue of, (1) his position as president and general manager; (2) his direct [fol. 149] ownership of record of 114,738 shares of the outstanding 12,000,000 shares of the capital stock of the company, constituting approximately one per cent thereof; (3) the direct ownership of record by his wife, Jessie M. Haussermann, of 865,000 constituting approximately 7¼ per cent of the total of 12,000,000 outstanding shares; (4) the ownership of record of the aggregate of 2,203,600 shares of the capital stock of the company by certain family trusts of which his wife, Jessie M. Haussermann is acting as the sole trustee, such trusts being for the benefit of his children and grandchildren."—You did qualify under the securities and exchange commission as parent, did you not?

A. I did not. The exchange commission did that. They said by virtue of that. I was president, I was the general manager and I was a director of the company. I owned the number of shares they stated there. My wife as trustee has the number of shares they stated there. Now what that amounted to in the eyes of the commission is up to them.

Q. I am afraid we misunderstand each other. The commission didn't say this; this is what you said.

A. Makes no difference what I said; that is what the commission says. I have never designated myself as parent; never thought of such a thing, but I understand it is in there—I don't know whether it is or not.

Q. This is the language you submitted in the registration statement?

A. It is the language which they interpreted it to mean. I admit I am president and general manager of the company; I admit that I own so many shares of stock, and I admit I am a director of the company; I admit my wife is trustee of family trusts. I admit all of that; whatever

[fol. 150] it adds up to however is for the commission to say.

Q. I will show you this identification "A" and ask you again whether or not the commission says that the Benguet, in its application to the commission, designates you as parent of the company?

A. Don't it decide that by virtue of all that they call me that? It is too fine for me to read. You read it there. They interpreted my position as being a parent, as I understand.

Mr. Mercier: Here it is in the print, Mr. Haussermann.

A. That is better. "John W. Haussermann, president and general manager of the company, is probably deemable under the securities act of 1933 and the rules and regulations of the securities and exchange commission thereunder, as parent of the company by virtue of (1) his position as president and general manager; (2) his direct ownership of record of 114,738 shares of the outstanding 12,000,000 shares of the capital stock of the company, constituting approximately one per cent thereof; (3) the direct ownership of record by his wife, Jessie M. Haussermann, of 865,000 shares, constituting approximately 7¼ per cent of the total of 12,000,000 ou-standing shares; (4) the ownership of record of the aggregate of 2,203,600 shares of the capital stock of the company by certain family trusts of which his wife, Jessie M. Haussermann is acting as the sole trustee, such trusts being for the benefit of his children and grandchildren".—They say that the rules and regulations so make me.

Q. You are reading from the prospectus of your company, prepared by you?

A. No, I did not prepare it.

Q. Isn't it in there?

[fol. 151] Mr. Mercier: We admit that it is in the prospectus and in the registration statement signed by the company and prepared by me, in collaboration with other counsel.

The Court: The statute does not say that there shall be any parent; it is simply a regulation of the commission.

By Mr. Scherer:

Q. Well, are you familiar with the rules and regulations of the securities exchange commission under the securities act of 1933?

A. Oh, no, not sufficiently to testify about. All I know is in this registration, they rule so-and-so, but I never read them.

Q. Do you know what the definition of the word "parent" is?

A. No, I had no occasion to.

Q. Have you ever heard it?

A. No, except as it is there. They say that by virtue of my ownership I am probably a parent. I never read the rules and regulations.

Q. Now, Judge, on direct examination, after you identified it I believe, the petition in the California case to which we have heretofore referred, was introduced in evidence. Are you familiar with the answer that was filed in that same case in answer to that petition, or complaint?

A. In a general way.

Mr. Mercier: We admit for the record, that the answer filed put in issue the question as to whether or not the Benguet Consolidated Mining Company was a corporation or was a sociedad anonima.

The Court: Well, the issues are made by the pleadings. The court may not pass on all of them.

By Mr. Scherer:

Q. Are you familiar with that answer?

A. Yes, in a general way.

[fol. 152] Q. Do you recall that in the answer the defendant specifically denied that it was a corporation?

A. I think that is true.

Q. And alleged that it was a sociedad anonima under the laws of the Philippine Islands?

A. The answer speaks for itself.

The Court: If that is in the answer it certainly raises a clear-cut issue. Plaintiff alleges it is, and defendant denies it. It may be the court did not decide so, but—

Mr. Scherer: That is what I meant.
Mr. Long: The court did decide that.
The Court: We will probably come to that later.

By Mr. Scherer:

Q. Now, Judge, you have funds belonging to the Benguet Consolidated Mining Company on deposit in the New Richmond National Bank under the name of John W. Haussermann, President No. 1, and John W. Haussermann, President No. 2, have you not?
A. I did have, but not now.
Q. You did have?
A. Yes.
Q. When were those accounts closed?

Mr. Long: I object. I don't know that that is competent.
The Court: What do you claim—that it is some evidence that they are doing business in Ohio?
Mr. Scherer: Yes, some evidence that they are d ng business in Ohio.
The Court: On that basis I will overrule the objection. You may answer the question.
Mr. Mercier: We have no objection to the question that they have accounts in the New Richmond Bank, but we do have objection as to when they were withdrawn, be-
[fol. 153] cause he said we did have. I don't think it is material when they were withdrawn. We had them, and admit that there were some funds in Ohio from 1942 to the time these suits were filed.
The Court: That is why I think it is competent. If these funds were withdrawn after this suit was commenced, then I think the time they were withdrawn and the accounts closed is a competent item. I will adhere to the ruling.
Mr. Mercier: Exception.

A. I don't recall the date, but it was since this suit was commenced that they were exhausted. I have been drawing on them ever since we started to rehabilitate.

By Mr. Scherer:

Q. Did you close——
A. Exhausted is the best word.
Q. After the attachment was had?

A. Yes, after the attachment.

Q. Now, Judge, you also——

Mr. Long: There was no attachment in this case. There were two suits filed in Batavia, and we know nothing about those cases; but there was no attachment in this case.

By Mr. Scherer:

Q. You also have had on deposit funds of Benguet Consolidated Mining Company in the First National Bank of Cincinnati under the name of John W. Haussermann, President No. 1, and John W. Haussermann, President No. 2, have you not?

A. I did have.

Q. You still have those funds on deposit?

A. Exhausted.

[fol. 154] Q. When were they exhausted?

A. Well, I wish I knew the exact date, but it is since this suit was commenced.

Q. You also have an office in the First National Bank Building of Cincinnati, Ohio, do you not?

A. No. They have been very courteous to me any time I wanted to occupy any part of their office, they were glad to have me do it.

Q. Did you have a telephone listing?

A. No, not to my knowledge.

Q. In the legal directory?

A. It is news to me if I have. My residence——

Q. No, I am talking of the First National Bank.

A. If there is I don't know it. I never put it there, Have I?

Q. Don't you have somebody there that takes calls for you?

A. No. That is all news to me.

Q. You have got some service you don't know of then, because I have called there a number of times——

A. They are courteous enough—I am a director there.

Q. No, no, not the bank; a separate office.

A. You are speaking of Cincinnati?

Q. Yes.

A. Oh, no, no.

Q. Do you have an office other than the bank office at New Richmond?

A. No.

Q. You did, or you do have an office at your home, do you not?

A. I call it a den; it is a desk.

Q. It is a separate telephone?

A. No, not a separate telephone. It is my home telephone. Wait a minute! I have a telephone in my office, my New Richmond office, and one in my home, but no separate telephone in my house.

[fol. 155] The Court: You mean the office you spoke of at the bank?

A. The office at the bank, yes.

By Mr. Scherer:

Q. You said the stock book of the Company is now in the Philippine Islands?

A. Well, that is the only place it could be. Don't misunderstand me. Of course they have the record of the shareholders in Cincinnati, and have it there, but the official books we are required by law to keep, of course are in the Philippines.

Q. I am referring to the stock book.

A. Well, I don't know what you mean other than that we had a stock record; I call it a stock record.

Q. Where are the stock records?

A. As I said before, I am sure that the First National Bank has a copy of all the outstanding shareholders because I furnished them a list as made up in 1945 when we opened up the office, and of course they keep track of the transfers that are made.

Q. Since this suit has been filed have you forwarded any stock records to the Philippines?

A. I?

Q. Yes.

A. No, only in one or two instances. Under this——

Mr. Mercier: The question is stock records.

A. (Continued) No, no. I thought you mean certificates. Personally I have sent nothing in the nature of stock records.

By Mr. Scherer:

Q. Judge, you remember on April 4, 1947, after this suit was filed, coming to our office, do you not?

A. Yes.

Q. And we had quite a lengthy conversation there?

A. Yes, sir.

[fol. 156] Q. And in that conversation did you not say that the stock records were in your possession at New Richmond?

A. You misunderstood me, because that would not be true. I haven't got the stock records.

Q. Did you say that?

A. If I did I did not intend to, because I haven't got it, and there was no reason I should tell you that.

Q. And didn't you say you had in your possession and gave me the number, Certificate 21776 for 52,874 shares of Benguet Consolidated Mining Company stock in the name of E. A. Perkins?

A. Oh, yes, I told you that, and that was true; I did have it.

Q. Do you have it now?

A. And told you the number of shares that he had in the company.

Q. Then whenever a share of stock is transferred here in the United States must that be sent to the Philippine Islands?

A. Oh, no. The transfer is made here at the First National Bank.

Q. Didn't you say that afternoon, Judge, that you would send us a photostatic copy of the certificate to which I have just referred, and the stock records?

A. Yes. You want to go into that?

Q. No.

A. I thought not.

Q. Judge, you have been buying machinery for the corporation, have you not?

A. No. The company has been buying it, not I personally.

Q. Haven't you been acting for and on behalf of the company, buying machinery?

A. I never bought a single piece of machinery for the

company. Requisitions are made in the Philippine Islands, sent to San Francisco, orders issued, negotiations had, and [fol. 157] everything agreed upon, and then I am called and asked to sign the official order for the benefit of the suppliers.

Q. You sign them here?

A. Sometimes here; wherever I am—Washington, D. C., many times in New York City, once or twice in Chicago—wherever the mail happens to catch up with me.

Q. You issued the checks for payment?

A. No—oh, yes, I signed the checks and sent them to Mrs. Baumann to pay.

Q. That has been in the last year, or the last few months?

A. Yes.

Q. In fact you told us what you were doing when you came to the office the afternoon of April 4 of this year, and complained because we had attached your funds, did you not?

A. If you asked me, yes.

Q. And didn't you say, "You got me all tied up. We are doing business here every day; we have ordered a lot of machinery and we have got a lot of checks out"?

A. That is machinery for the company, and what you say is mainly true, because the company had lots of checks out at the time, and lots of orders out for machinery. That is probably true.

Q. You used the expression "We are doing business here every day", did you not?

A. Oh, Mr. Scherer, you know when you are president of a company you often refer to it as our company. Benguet has ten thousand shareholders scattered all over the United States, many of them here in Cincinnati.

Q. Well, the accounts we attached in the Clermont county case were the four to which we have just referred?

Mr. Long: I object.

[fol. 158] The Court: Objection sustained. I don't see the relevancy of this. I am hearing the question of whether or not the summons and the alias summons has been quashed.

Mr. Scherer: That was merely setting the basis for my next question, if the court please.

Q. Didn't you say in the office that "You have attached my funds" referring to those accounts?

A. I thought you had, at that time.

Q. And didn't you say that that was going to interfere with your doing business here?

A. Well, it would have so far as the bank is concerned. Those payments had to be made and I had the funds, and you tied them up. The obligations were out, the orders were out, the machinery was being purchased all over the United States.

Q. You say you came back to the United States in 1915?

A. Yes.

Q. And were here continuously until 1928?

A. Oh, no. I returned to the Philippine Islands in 1916, for a few months, and came back and went back to the islands; that is backwards and forwards each year excepting the year 1919. I don't think I was over there in 1919.

Q. Between 1928 and 1940 or 1941 when you came back the last time before the war, how many times were you back and forth between the Philippines and the United States, approximately?

A. Well, I was there continuously—went back there in 1928 or the first of—must have been 1928, and assumed charge then, because Mr. Beam was ill and could not continue his duties. Now in 1932—is that the presidential election? I can tell better by that.

[fol. 159] Q. Yes, unfortunately it was!

A. (Continued) The Republican and Democratic national committee cut us off from the Philippines on the theory that we were going to be independent in '46 and that we were not on the call, neither Democratic nor Republican. Well, the conventions got under way and we decided we would make a fight for it, and I was put on the national Republican committee, that was the first convention to get back here in 1932, and I made a fight to get us reinstated, and was successful, so we could fight. That was in 1932. I was on the national committee then. They did not take me off, and I came back in 1940 for the convention.

Mr. Long: Back to the United States?

A. Yes.

Q. You were in the Philippines?

A. Yes, until I came back. I came back in 1932 and 1940 came back—went back in 1940 and in 1941 I came back and

the war started and I have never been able to get back. Those visits after I went back in 1929 were as part of the conventions.

Q. Mrs. Haussermann has been here how many times prior to the war?

A. I think the last time she went to the Philippines was in 1924.

Mr. Mercier: You mean 1934?

A. Was it '34? I have forgotten. I wish I had my diary here. Mrs. Haussermann has been wanting me to come back and live here for years and years. I can't get over very often.

By Mr. Scherer:

Q. At least she has been here since 1934?

A. I don't deny that my residence is here in the United States.

Mr. Scherer: I think that is all at this time.

[fol. 160] Redirect examination.

By Mr. Long:

Q. Just a couple of questions, Judge. Mr. Scherer has read to you and asked you about statements that were contained in the prospectus which you filed with the SCC, I will ask you whether or not you made this statement also in that connection: "By reason of the fact that the company is a Philippine sociedad anonima with its only office and place of business in the Philippine Islands, and that same of its directors and officers are or will be residents of the Philippines, it may be extremely difficult to enforce against the company or against such of its directors or officers as may be residents of the Philippines, liability under the securities act of 1933"? You had that in your prospectus, did you not?

A. Oh, yes.

Q. And he has read to you this language also in the prospectus with reference to this suit of Harden v. Benguet: "The higher court, while not passing on the question of the applicability of the statute in question to a

sociedad anonima, held that the company's right to the stock of Balatoc was good against the world". You put that in, too?

A. Yes.

Q. Mr. Scherer also read from your prospectus about you being the parent of the company, but he did not read this, though you did have it in your prospectus: "The said family trusts, however, do not own beneficially the aforesaid 2,203,600 shares owned of record by them, said shares having prior to the date hereof been sold on the dates in the amount and to Allen & Company as follows:"

A. Certainly.

[fol. 161] Q. Now, Mr. Haussermann, Mr. Scherer read from your deposition and I want to read you the next question after the last answer he asked you whether you made or not. This is on page 5: "Is Benguet frequently referred to as a corporation?"—Do you remember answering: "Oh, quite frequently"?

A. Yes.

Q. And you remember him asking this question in the deposition: "How are ownership participations by the defendant company evidenced?" and your answer: "By what we call certificates of stock. The shareholders each have a certificate of stock as we call it". And then: "And are those substantially like the corporation share certificates that we are familiar with in this country?" and your answer: "Practicaly the same".

A. That is right.

Q. And another question you were asked, on page 6: "Are the company's records substantially like those of an American corporation?" and your answer: "I should think so, yes".

A. Yes.

Q. Now, Judge, maybe this question isn't competent, but do you know how the California court decided this matter, as to whether you were a corporation or not?

Mr. Scherer: I object.

The Court: Sustained. The official reports are the best evidence of what the court decided.

By Mr. Long:

Q. Just one other question, Judge. I found this in my file. I want to hand you what has been marked for identification "B", and notice it is marked by-laws of Benguet Consolidated Mining Company, amended July 1, 1929, an English and Spanish version of your by-laws at that time. Is that a copy of the by-laws at that time?

A. Yes.

[fol. 162] Mr. Long: I will offer this in evidence if the court please.

Mr. Scherer: Objection.

Mr. Long: The point is that there has been a—I think your Honor has concluded that there was some confusion as to what the exact nature and style of this business operation was, and there have been statements offered here as to what he said it was, what the courts said it was and I want to show by this, your Honor please, that as far back as July 1, 1921, in the by-laws that they decided this company referred to this, "The management of the corporation shall be delegated to five directors", and so forth, and all through it refers to this as a corporation.

Mr. Scherer: If the court please, this is not from the official records of the corporation. I have never seen this before; it is a printed pamphlet.

The Court: If the witness has identified it as the by-laws of the company the mere fact that it is not authenticated, or that you have not seen it does not bear on its competency. If you want me to reserve my ruling until the next time we have this case on and look at it in the meantime it is all right.

In view of the fact that Mr. Scherer says he has not seen it and would like to have time to examine it, I will reserve my ruling and will say that the budren will be upon him to show me that this is not competent. My present notion is that it is competent.

Mr. Long: I have nothing further to ask the witness at this time, your Honor.

(And thereupon witness left the stand.)

[fol. 163] And thereupon counsel for defendant called as a witness on the motion, FLORENCE SMALL, who, being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Long;

Q. Will you state your name, please?
A. Florence Small.
Q. Where do you live, Miss Small?
A. Hyattesville, Maryland, a suburb of Washington.
Q. Miss Small, I will ask you to state whether you took any part in the translation of the document in Spanish which is marked Exhibit 1 in this case?
A. Yes, sir, I did.
Q. Miss Small, I understand that you are familiar with Spanish?
A. Yes, sir.
Q. And you can translate it into English?
A. Yes.
Q. And are you a graduate of any university?
A. Yes, sir, graduated from the University of Maryland.
Q. And you majored in Spanish?
A. I minored in Spanish.
Q. And I will ask you to state, Miss Small—I will ask you to take a look at Section 11 of these articles of incorporation, contained in Exhibit 1, and would you be good enough to translate that for the court into idiomatic English?
A. Well, the responsibility—or liability—of each stockholder—shareholder—of this company shall not exceed the capital given by him as soon as it is paid—or which he paid.
Q. In other words, Miss Small, if you will look at that again, I will ask you to state whether what I am about to [fol. 164] read as the translation of that section which was read to this court previously, is a correct translation.

Mr. Scherer: I object.
Mr. Long: I haven't finished yet.
The Court: Finish your question.

Q. (Continued by Mr. Long) "The liability of each stockholder of this company shall not exceed that of the capital contributed by him as soon as it is paid".

Mr. Scherer: Objection.

The Court: What is the objection?

Mr. Scherer: I think the witness is their witness and she should translate it.

Witness: I did translate it.

The Court: She translated it, and he asked if what he was reading was not the exact translation. I see no harm in that. Objection overruled.

A. Yes, sir, that is.

Mr. Long: Cross examine.

Cross-examination.

By Mr. Scherer:

Q Was the translation omitted from the certified copy of the articles of incorporation, or association, filed with the securities and exchange commission?

A. I assume it was. In looking over the translation I find I skipped the two-line sentence, and numbered the rest of the articles after that. It was just stupid, a typographical error.

Q. That was inadvertently omitted from your translation?

A. Yes, sir.

Mr. Scherer: That is all.

[fol. 165] (And thereupon witness left the stand.)

Mr. Long: That is all our evidence on our motion, your Honor.

And thereupon the further hearing on this motion was continued to a date to be determined later.

Monday, August 4, 1947, 10 o'clock.

Mr. Scherer: If the court please, I understand of course that the defendant in this case has rested, in so far as the production of evidence in support of its motion to quash is concerned.

I would like to ask the permission of the court to cross examine Judge Haussermann further. I talked to counsel for the defendant, and they have not agreed to that procedure, and so I am making the appeal to the court.

I also said I would not make this request if they would make no objection to us calling him as if on cross-examination in the presentation of our case. I think we can do that. There is no question in my mind that we are able to do it, but I wanted to make this application at this time, should they make an objection to us calling him as if on cross examination, and should the court not agree with me.

The Court: Your motion to further cross examine will be granted.

Mr. Long: For the purpose of the record, do I understand that our case is being reopened on this motion? We have no objection to him calling Judge Haussermann as if on cross examination as part of his case, but do I understand that the ruling is that our case is reopened, and that is——

[fol. 166] The Court: As I understand the rule, the court in the interests of justice, at any time can permit further proceedings on either side. Mr. Scherer states that he wants to ask some questions that he has overlooked, or that have come to his attention since the hearing, and the court grants that application.

Mr. Long: Note our exception.

Mr. Scherer: Now, if the court please, to clarify our position with reference to the question asked, and since it has been quite some time; if you recall, it is our primary contention that Benguet is a sociedad anonima, created under the Spanish code of the Philippines; that is one of the forms of partnership. There are three forms, and this is one, provided for by the old Spanish code of commerce of the Philippines. It is not a Philippine corporation.

It is our further contention that it is almost the exact equivalent of an Ohio partnership association, and we will enlarge on that when we make our arguments.

The purpose of the questions this morning, should your Honor find that the defendant is right in its contention

that it is a foreign corporation, or similar to an American corporation, it is our contention that this company has done business, and was doing business in Ohio at the time this suit was filed, of such nature and to such an extent as to make it amenable to service under Section 11290 of the General Code of Ohio, providing for service.

We do not admit of course, that it is a foreign corporation, or similar to an American corporation, but if your Honor holds against us, our contention is that we [fol. 167] are still in court because Benguet is doing business here so as to make it amenable to service under 11290.

That is the purpose of our questioning this morning of Judge Haussermann. There may be some questions we have overlooked that refer to a sociedad anonima, the nature of it.

And thereupon the plaintiff recalled the witness, JOHN W. HAUSSERMANN, for the purpose of additional cross-examination; said witness having been heretofore sworn to testify in this case, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Scherer:

Q. Mr. Haussermann, the board of directors of Benguet Consolidated Mining Company had a meeting on January 23, 1946, at Pond Run Farm in Clermont county, Ohio, did they not?

A. I think so; if you have it there, sure.

Q. Do you recall such a meeting about that time?

A. About that time, yes.

Q. Do you have the original minutes of that meeting?

A. Not the original minutes; they have gone to Manila.

Q. I have here a copy of the minutes, appearing to be an original, signed by you and Rose T. McKee, which were submitted to the First National Bank following the meeting. I would like you to look at this and see whether or not that is a true and correct copy of the minutes of that meeting, or whether they are the original.

A. That is signed by me, and by Rose McKee; that is correct.

Q. You recall that the copy of the minutes was sent to the First National Bank because one of the resolutions [fol. 168] adopted at the meeting was the resolution designating the First National Bank as transfer agent of Benguet stock in this country?

A. I assume it was sent to them.

Q. Now, that meeting was held at your home in Clermont county?

A. It was.

Q. Or was it held at the office in New Richmond?

A. No, I think every meeting of the Benguet was at the farm.

Mr. Scherer: Now, if the court please, I would like to introduce these minutes as Plaintiff's Exhibit 1.

The Court: You can't introduce any evidence on cross-examination.

Mr. Scherer: I am sorry. We will have it marked for identification. It was identified as Z-12 in the deposition taken recently.

(Said minutes were remarked as Z-12 for identification.)

Q. Now, in addition to the meeting that we have just referred to, how many more meetings of the board of directors of Benguet were held at Clermont county since 1940?

A. I would have to look that up. I don't know. I tried to think of that yesterday, and I think it was all told since I have been in the states, about nine meetings. Two or three were held at Pond Run. I am not sure, but the minutes will show on their face.

Q. Now, at this particular meeting, Judge, of January 23, 1946, you reported to the board of directors the efforts which you were making towards the purchase of suitable machinery for the properties; did you make that report?

A. If it is there I made it. I know I was doing it.

[fol. 169] Q. And you advised the board at that time of certain equipment that was on the west coast ready to be shipped as a result of your efforts, did you not?

A. If it is so stated, yes.

Q. Do you remember this resolution having been adopted at that meeting: "Resolved that all of the——"

Mr. Long: I thought Mr. Scherer wanted to refer to that, and then have some point he wanted to ask the judge about; but it appears to me this speaks for itself. I think the other two questions were objectionable. Now he is proceeding to read from this document, which has been identified by the judge as an accurate account of what took place at the meeting, and it speaks for itself, so we are objecting.

Mr. Scherer: I am going to predicate some further questions on the information contained in this document, and Judge Haussermann, the last time he was on the stand, before I had this document if you will recall, when we asked him about his statement in our office that he was buying machinery here, partially admitted that such statement was made, but said that somebody on the west coast was buying it and that he was not buying it. I think I have a right to show what he reported to the board of directors.

The Court: You have a right to show it, but not when you have the written evidence of the minutes that shows it. They are the best evidence. You can base your questions on an assumption until you get the minutes in evidence in the record.

By Mr. Scherer:

Q. Judge, you have, since the termination of hostilities in the Pacific, personally negotiated here in Cincinnati or in Clermont County, continuously for the purchase of ma- [fol. 170] chinery and equipment and material, have you not?

A. I did not. I never negotiated the purchase of any particular machinery in Ohio or any other place.

Q. Did you report so to your board of directors, that you had personally——

A. Whatever I reported is incorporated in the minutes of the meeting.

Q. Well, didn't your board of directors authorize you to negotiate for the purchase of machinery, equipment and materials?

Mr. Long: We object. The minutes are the best evidence of that. He is asking for conclusions about what was done.

The Court: Aren't you attempting to prove agency by the agent?

Mr. Scherer: I will withdraw the question.

Q. On December 31 didn't you personally cable to the Philippines, for the rehabilitation of the mines' payrolls and machinery, the sum of $72,000.00 of Benguet funds?

A. I don't understand what you mean.

Q. On December 31, Judge, of 194——

A. May I see that? Whatever is in there is true, but I cannot recall what it is.

Q. It is on page 3, the first paragraph appearing on page 3.

A. What I stated there is true.

Q. Then can you answer my question whether or not you personally, from this state, cabled or ordered cabled the sum of $72,545.00 of Benguet funds?

A. I did not. I did exactly what this says. "The judge further reported that up to the thirty-first of December there had been cabled to the Philippines for the purpose of rehabilitation of the mines' payrolls, etc., the sum of [fol. 171] $72,545.00 of Benguet funds, and the sum of $12,000.00 of Balatoc funds".

Q. Who ordered that money cabled?

A. Nobody ordered it cabled excepting myself in this way: the purchases were made by Mrs. Baumann on requisition from the Philippine Islands, and she would say, "We have this here, ready for shipment, and require so much money". If that payment was to be made in the United States it was sent to Mrs. Baumann in the form of a check in the name of the person who sold the machinery; if the machinery was bought in the Philippines that money was sent out there.

Q. Who ordered that amount of money, to which I have referred in the minutes, paid?

A. I cabled the money to the Philippines.

Q. On what bank?

A. I would have the cable—it is usually done this way, and I assume this is the way it was done——

Q. If you don't recall——

A. I am telling you the best I know how. If the funds were in the President No. 1 in the First National Bank of Cincinnati, or in the New Richmond National Bank, I would draw a check on that and instruct them to have the National

City Bank of New York cable to their—transfer to their branch in Manila for the credit of Mr. Peterson as agent.

Q. Anyway, instructions were either to the New Richmord National Bank or to the First National Bank of Cincinnati?

A. No money was cabled to Manila excepting of course by me.

Q. By withdrawals made on these two accounts to which you have referred?

A. Yes, sir, one or the other.

[fol. 172] Q. Now, those two accounts that you have in the New Richmond National Bank were Benguet Consolidated Mining Company funds, were they not?

A. They were.

Q. And the two accounts that you had in the First National Bank of Cincinnati were Benguet Consolidated Mining Company accounts also?

A. No. 1 and No. 2, yes.

Q. They were designated John W. Haussermann President No. 1, and John W. Haussermann President No. 2?

A. Yes.

Q. And you were the only person that could sign checks to withdraw funds on those accounts?

A. On those accounts, yes, sir.

Q. This may be repetition, but you don't recall whether this was testified to before, do you, but I want to be sure it is in, those accounts were opened in 1942, were they not?

A. I think that is the date.

Q. And they were active, open accounts until April 30 of this year, 1947?

A. They were—yes, I think I understand what you mean; they were in existence during that period of time.

Q. And all four of those accounts have now been closed, or as you call it, exhausted?

A. Yes.

Q. And this action before the court at the present time was filed on April 4 of this year?

Mr. Long: Objection; that shows on the face of it.

Mr. Mercier: If the court please, this is not an action for money, but to compel the Benguet to transfer some stock,

and has nothing to do with money, so we object to the question.

The Court: Objection sustained. The court sustains the objection, Mr. Scherer, on the ground that the witness can-
[fol. 173] not be required to say when the suit was filed. The court will take judicial notice of when the suit was filed.

By Mr. Scherer:

Q. All checks drawn on these accounts for the payment of obligations of Benguet Consolidated Mining Company were signed by you, were they not?

Mr. Long: I object to that as being repetition.

The Court: I am going to permit the question. It may be repetition, but this hearing has been broken up and no one can keep in his head everything asked; so he may answer.

A. I signed all checks No. 1 and No. 2 at either bank.

By Mr. Scherer:

Q. And you or your secretary made all deposits, did you not, in those two accounts?

A. Well, yes. I don't know whether there — any No. 1 account or not. I know there was some in the No. 2. If any check came that applied to No. 1 I deposited it there; if No. 2, I deposited it there.

Q. Now, Judge, from whom did these invoices come on which you issued checks?

A. No invoices came to me; they all went to Mrs. Baumann, to be transferred to Manila. Mrs. Baumann is in San Francisco. I drew the checks at the request of Mrs. Baumann. She wrote a letter, "Please send under No. 1 the money, checks, for so-and-so," and give the name. If you have one of the sample letters here I can show you, exactly how it was done.

Q. Will you repeat that again, Judge, please?

A. I received no invoices of any kind whatsoever, of any of the stuff purchased in the United States. That was all sent directly by the seller to Mrs. Baumann in San Fran-
[fol. 174] cisco, and in turn sent out to the Philippine Islands after requesting me to send her a check in favor of the seller, whoever that might be, which I did, and transmitted

it by mail to Mrs. Baumann, and she paid it, if it was in the United States, with those checks.

Q. That is, Mrs. Baumann sent either a letter or a telegram to you here in New Richmond?

A. Yes; usually it was a letter from her.

Q. And asked you to draw certain checks?

A. That is right.

Q. And you would draw them here?

A. Yes.

Q. And then where did you send them?

A. I sent them to Mrs. Baumann in San Francisco.

Q. You didn't follow that procedure that you outlined at all times, did you?

A. At all times save and except within the last couple of months, some of the sellers who never had done business with the Banguet asked that advance payments be made, and Mrs. Baumann would communicate that to me, and in order to save time I would send it to the seller, and I would draw a check in favor of the seller, an advance payment before anything was actually delivered.

Q. You mean in the last few months before these accounts were closed or exhausted, you did follow a different procedure, did you not?

A. Not all the time.

Q. In some instances you did?

A. Yes, in some instances. I want to be perfectly frank

Q. That is, you would order checks sent directly and you would send the checks directly to purchasers of material?

A. Not even that. If you will give me a chance I will tell you.

[fol. 175] The Court: Isn't the court required to consider this case on the basis of what happened prior to this attempted service, and not on what happened since then? In other words, could I consider anything that was done by this company in Ohio, either as a partnership or as a corporation, when I come to consider whether or not this is or is not good service? Don't I have to consider what was done prior to the date that the sheriff served this notice?

Mr. Scherer: I think so, and even subsequent to the time,

to show a course of conduct on the part of this company, whether it is doing business.

The Court: I don't think you can make service good by a course of conduct. As I understand your proposition, it is two-fold: First, you claim that this company under the law of Ohio is not, and never was anything else except a partnership——

Mr. Scherer: Similar to our partnership associations.

The Court: The second proposition you advance is than even though the court determines that this is a corporation, or similar, kindred to a corporation under the laws of Ohio, still this company has done sufficient business in Ohio to make it amenable to the service of process under our statute. Now if it is a partnership, of course service on one partner brings in the partnership. You don't make any claim that that is not true, do you, gentlemen?

Mr. Scherer: No, your Honor.

Mr. Long: No, sir.

The Court: If it is kin to a corporation, and you are trying to bring them in because they have done business in Ohio, it seems to the court you would have to prove [fol. 176] what they did in Ohio prior to the time you get service, or prior to the time the sheriff served the papers, and not something that happened in the last two months.

Mr. Scherer: No, this was in the very month that the service was made.

The Court: As I understood it, Judge Haussermann testified that they did business in a certain fashion after the war came on, and then he said they always did it that way except in the last two months, and then you asked about the last——

Witness: The last two months. He asked if we always did it that way. Prior of course to the war, all money was handled from the Philippines, through Wells Fargo, but during the war those funds were here, and certain bills and obligations were created and some were pending when the war started, which were paid out of those funds by me as President No. 1 and none of it as I remember was involved in the state of Ohio in any way, shape or form.

The Court: I think we probably all understand Judge, now.

Witness: After those funds were exhausted then the payments were made by my personal check.

By Mr. Scherer:

Q. I am referring to before those funds were exhausted. Before the funds were exhausted on these accounts, you said the usual practice was, as I understood it, Mr. Haussermann, for you to receive a letter from this woman in San Francisco?

A. Yes.

Q. Telling you how much was due certain companies for materials and so on, and you here in Cincinnati received that letter and would have your secretary make out the [fol. 177] checks and mail them to her?

A. In favor of the person she said we were owing it to.

Q. And then she would mail them to the creditor?

A. Yes.

Q. I understand you said after this suit was filed you mailed checks directly on your personal account?

A. No, not after the suit was filed; not until the funds were exhausted.

Mr. Mercier: He didn't say he mailed them directly to anybody.

Witness: No, I didn't say that, did I?

By Mr. Scherer:

Q. Now, Judge, you were doing business in the month of April and the month of May—between January 1, 1947, and April 30, 1947——

Mr. Mercier: I object.

The Court: Let him finish his question.

Mr. Scherer: I will withdraw it.

Q. Benguet was purchasing machinery and materials between January and April of 1947 from the people and companies——

A. We were buying machinery by requisition of the people in the Philippines. It would come to Mrs. Baumann as I understand, and as I told you before, and the only thing I had to do was the ministerial act of signing a check and

sending it to Mrs. Baumann in the name of the seller, I will put it that way. Now that is all I had to do with it.

Q. You never had any negotiations with any of these people?

A. Absolutely not.

Q. None at all?

A. None at all. The operations were going on in the Philippine Islands, and I was not in a position to order anything. I didn't know what they wanted.

[fol. 178] Q. You had no conversations or any correspondence with the Lindy Air Products Company of New York?

A. I don't recall any. The only correspondence I had with any of the sellers about it, if any, was to try to find out when they were going to ship the things that were on order. I made several trips east where these people were, to ask about it. I was pushing it. We were delayed by strikes and everything here in the United States and I wanted to help get the stuff out there.

Q. You did have correspondence with them then?

A. Well, I might have had. I don't recall any. I don't even recall that firm at all.

Q. Didn't you directly order a check mailed to them?

A. That is possible; if Mrs. Baumann asked me to do it I did it, I am sure.

Q. For $2,156.00?

A. Whatever it was.

Q. Didn't you have some correspondence with the Oliver United Filters Incorporated, 42nd street in New York City?

A. I don't think I ever wrote them a letter. I was there several times in New York, interviewing some of the people connected with that company, because I knew them, and I spoke up and said to them, "When are you going to ship our stuff?", but I don't recall ever writing to them.

Q. Did you have any correspondence, Judge, with the Atkins-Kroll Company prior to April 4, 1947?

A. I think not; not that I recall.

Q. Any telephone calls?

A. Not that I recall.

Q. What did you purchase from them?

A. You have got me there; I don't know.

[fol. 179] Q. Do you recall what you purchased from the Oliver United Filters Company?

A. No. They deal in filters, don't they, and filter cloth?

Q. Mine filters?

A. Oh, yes.

Q. Who is Mrs. Paul Shafer?

A. She is the wife of our geologist in the Philippines; she is here, and he is over there.

Q. What were payments made to her for?

A. Mr. Peterson, at the request of her husband, asked me to pay a part of his allotment, or the allotment to his wife, and I did that. I reported it to Manila, what I did at their request.

Q. That was part of his salary?

A. I think so. I feel quite sure it was. When the husband said, "Please send my wife so much money", I am sure I did it.

Q. That was for service rendered the company?

A. He was working for the comapny, and why that request was made I don't know; but I assume it was part of his salary.

Q. And that was paid by you here in Ohio, from his accounts, to his wife?

A. Yes; it was a check drawn in favor of the wife, and mailed to her wherever she happened to be.

Q. Who is Mrs. Lillian S. Barry—an employe of Benguet?

A. No, she is the mother of Mrs. Barry, who is employed by us in the Philippines as our purchasing agent, and he asked us to make certain payments to his mother who I think is somewhere down south. I complied, and sent the check every month.

Q. You sent part of his allotment or salary to his mother?

A. At his request, yes.

[fol. 180] Q. You did that here, by check drawn on your account in the New Richmond Bank?

A. Oh, I don't know; it was drawn on Account No. 1, wherever that was.

Q. It shows New Richmond——

A. Then it was New Richmond.

Mr. Mercier: I think he is taking advantage of a ruling your Honor made. The question before the court is whether, on the date service was made on the Benguet, on

that date the comapny was engaged in doing business in the state of Ohio. Counsel has examined for twenty minutes—your Honor told him it would not be proper to show any checks sent out subsequent to the date of service, and I would like to call that to your Honor's attention.

Mr. Scherer: Your Honor please, before this was a—we have our evidence here, but there were periodical dealings with these people. I did not ask if he did it after April 4; I asked before April 4.

Mr. Mercier: I object to his referring to what is in his hand, which is a letter about April 30, twenty-six days after service of process in this case.

The Court: The court cannot take cognizance of what Mr. Scherer has in his hands. All the court can do is rule upon the competency of the questions. The court has indicated, and so that there will be not further uncertainty about it the court rules now, that it is incumbent upon counsel to confine the act of this company—confine his questions to acts of this company prior to the date of the alleged service of summons, and not to transactions which may have occurred after that date. That will be the ruling, and either or both sides may have an exception to it. I don't think I can take [fol. 181] into consideration anything that happened since that date of attempted service, unless it was a payment for some item contracted for prior to that date. If they were doing business and contracted for an item before the date of service, and you want to show actual payment after the service—but to go into the manner of transacting business after the date of service I think is entirely incompetent.

Mr. Scherer: I will state professionally here that all of these were contracted before these payments were made——

Mr. Mercier: How can you say that? Do you know whether or not any of these were——

Mr. Scherer: Yes; I was in New York and talked to the Lindy Air Products Company last week.

The Court: The court has ruled, and I think you all understand the ruling of the court. Now Mr. Scherer says professionally to the court he is not going to ask about anything for which contract was not made before the date of the attempted service. The court accepts his professional word for anything he says.

By Mr. Scherer:

Q. Judge, may I ask you with reference to Mrs. Paul Shafer, this $400.00 you were paying her directly for services rendered by her husband in the Philippines; over how long a period were you doing that?

A. He was employed by us prior to the war, and was interned like the rest, and then he came back here and went back to work over there again. I just don't recall when he went back to the Philippine Islands, but it must have been perhaps a year or less than he was out.

Q. Over how long a period had you been paying her the $400.00?

A. I don't know. I am inclined to think—although I [fol. 182] don't know—that I commenced paying it just as soon as he got there.

Q. And that was about a year ago?

A. Yes.

Q. That is, you have made more than one payment to her?

A. Oh, yes. In order that you will thoroughly understand that, the wives of our employees out there were sent checks out of those accounts No. 1 at the request of their husbands out there.

Q. And you were making those payments prior to April of 1947, weren't you?

A. Well, after we had our staff back there.

Q. I am asking if you had not been making these payments to the wives prior to April 4, 1947.

A. I say, from the time the men were employed out there after they went back out there; some went in 1945, some in 1946, and some I think in 1947. Those husbands did not take their wives, and they would usually ask Mr. Peterson to ask me to pay part of their salary here to their wives in the United States. I did that, at their request.

Q. During 1945 and 1946 you were doing that?

A. Whenever a man went out there.

Q. And you would make them monthly?

A. Certainly.

Q. And you made payments to Mrs. Joseph C. Thompson for the same reason?

A. Evidently.

Q. Mrs. A. B. Toohey?

A. Yes, I remember that.

Q. And you paid Jean Waters?

A. Yes, I recall that. He worked I think for the Heald Lumber Comapny, and they had no funds, and I advanced it at their request, and charged it to the company out there.

Q. And Mrs. Grace E. Sayhorn?

A. The same. He was our auditor out there.

[fol. 183] Q. The same applied to Mrs. Blanche Ritter?

A. He is our general electrician.

Q. And Mrs. Barry?

A. She is the mother of Mr. Barry I spoke about.

Q. The same procedure applied?

A. Yes, except it was his mother and not his wife.

Q. What about Geraldine B. Edwards?

A. I don't recall that name, but if it is down there, it may be so, but I don't recall it.

Q. Rosemary McEvelley?

A. The wife of a mining engineer.

Q. L. W. Lenox?

A. He is our mill superintendent and at his request I sent whatever it was to his wife in the states; however, she is now out there, but while she was in the states I sent it to her.

Q. And that was during 1945 to 1946?

A. Well, after he went there in '46, yes.

Q. And Katherine L. Dana?

A. Yes; he is one of our employees.

Q. And payments were made to her?

A. At his request.

Q. Now was it the Lindy Air Products Company that you had the correspondence with?

A. Who?

Q. The Lindy Air Products Company.

A. I don't know that company.

Q. Urging them to fill the orders promptly?

A. No; as I said I never had any correspondence with any of our suppliers in the nature of negotiations for the purchase of anything. It may be that I have written or telephoned, or talked to them personally to send the things as soon as he can that were on order. I have no recollection [fol. 184] of ever corresponding with, or telephoning, or knowing that company.

Q. Now when did the obligation for which you sent a check to Lindy Air Products Company directly from New Richmond in the amount of $2,156.33 on April 30, 1947, when did that obligation arise?

A. I couldn't tell you that. I don't know. I had nothing to do with creating the obligation, and don't know. I know that some orders were placed in New York in 1945, and I know it was not delivered until the latter part of 1946. I happen to know that because I was in New York at that time.

Q. You have no recollection when this Lindy Air Products Company order was placed?

A. No, I have no way of knowing that. That was done by Mrs. Baumann. All I did was, when it was time to be paid as I said, she would send me a letter or a telegram, "Issue a check to so-and-so for so much", which I did at her request.

Q. That procedure had been followed long before April 4 had it not?

A. That procedure—since the war, and we resumed operations; that was an emergency plan we had to adopt because of the war. The funds of the company were here and they were here, and no funds there, and they needed machinery and went through the form of finding out what they wanted, where they wanted it, and that was all done, prices ascertained and everything by Mrs. Baumann. I was not competent to deal with it.

Q. You were general manager of the company during that time?

A. Yes.

[fol. 185] Q. And its representative in the United States?

A. I am president and general manager; that is all I am.

Q. Now do you know, Judge Haussermann, when the obligation arose with the Oliver United Filters Incorporated of Forty-second street, New York?

A. I do not; and since this recess I looked through that and want to say to you now I have no knowledge of when any of the obligations were created for which checks were issued.

Q. Except the names?

A. I know they worked there, but I don't know whether

they drew all their salaries or only a part. The request came from the Philippine Islands to pay them so much each month out of their salary—whether they earned it I don't know.

Q. You were paying those salaries before April, 1947?

A. At the direction of Mr. Peterson, the chief of staff.

Q. Did you bring with you, as requested in the subpoena, the correspondence from—who did you say you had correspondence with here in the United States with reference to this machinery?

A. I said I had no correspondence with any of our suppliers in reference to machinery, except it may be in one or two instances I don't recall, but I may have asked when they can deliver the stuff on order.

Q. I forget the name of the woman you mentioned in San Francisco.

A. Mrs. Baumann; she is the purchasing agent.

Q. Do you have with you the correspondence that you had with her with reference to the payment of these checks?

A. I think there is some there. I tried to respond to the subpoena.

[fol. 186] Mr. Mercier: I object. You have made no request to supply that.

Mr. Scherer: I have subpoenaed Judge Haussermann, and asked him to bring that evidence with him.

The Court: You have asked whether he has it, and he says he thinks it is here. Objection overruled.

By Mr. Scherer:

Q. Do you have that correspondence?

A. I hope so—if that is covered by the subpoena.

Q. Judge, in these cases where you contacted, or may have contacted suppliers urging them to ship orders that were late, or held back, where did you get the information from that the orders had not been shipped?

A. I knew strikes were on, and I knew that they were delaying everything, and I knew that we had all kinds of machinery and supplies under order. I could not help knowing that, and I tried to find out.

Q. You would get that information from cablegrams, and

correspondence with the Philippines and with Mrs. Baumann and others?

A. Yes. You see I have been in San Francisco so often and asked how things were going along, and Mrs. Baumann would say, "Well, this fellow says he will ship such-and-such a time", and if I thought a little personal contact would be of some assistance I did not hesitate to go and call on them and see if they could hurry it up, or anything.

Q. Or write a letter, or send a telegram?

A. Yes, though you could not do much in letterwriting on those cases, you know.

Q. You have had just volumes of correspondence with reference to Benguet business, and Benguet affairs since you have been here in 1940, haven't you?

A. I have had many letters from shareholders, asking [fol. 187] what is going on in the Philippines? I had letters from individuals not connected with our company, but who were contemplating going into business there, and wanted to know what business conditions were; and Benguet was doing business in the Philippines and located in the Philippines. We didn't do business here in Ohio, or any place else except the Philippines, only to buy machinery and supplies.

Q. But you still are the president and general manager, and were at that time, and all during that time?

A. Yes.

Q. And you controlled all the affairs of that company during that time, did you not?

A. No, I did not control all the affairs of the company. The directors did everything they could, and there has not been a shareholders' meeting since the war.

Q. Weren't you in full charge of the rehabilitation of the mines? Isn't that directly under you?

A. How is that?

Q. Isn't the rehabilitation of the mines since the war directly under you?

A. I don't know what you mean by directly. I am not a mining engineer, and never was. I had a staff of competent employees who were interned out there; they came back here to recuperate after the war, after their internment, and then I sent them back to the Islands and they are the ones who started the campaign of rehabilitation, of what

should be done and everything like that; and what things they wanted they would write to Mrs. Baumann and request that she order them, and she would furnish it by going out and buying it and sending it out there.—That is the suppliers sent it out there. When the time came it was to be [fol. 188] paid for, the funds were here and I would get a letter from Mrs. Baumann stating "Please send a check to so-and-so for so much on No. 1 or No. 2".

Q. Haven't you had voluminous correspondence with Mr. Peterson and the officials out there, telegrams and cablegrams, with reference to this rehabilitation of the mines?

A. Mr. Peterson wrote me quite frequently as to how they were getting along, and every month the auditor sent me a report—that is Mr. Peterson sent it, of what was going on. I was very anxious for the benefit of the shareholders here in the United States, of keeping well informed of what was happening, so I could furnish the information to any one who asked me.

Q. You carried on correspondence constantly with Mr. Mercier during those years didn't you, with reference to the status——

A. Well, Mr. Mercier is a lawyer, and I would not ask him much about mining engineers, but when it came to legal questions, of course I wrote him.

Q. With reference to the business of the company?

A. Any legal matters.

Q. This office you have in the New Richmond Bank, Judge, you have considerable files there, do you not?

A. Well, I don't know what you mean by "considerable"; we have all the files that we need.

Q. And you have brought with you a large grip of correspondence, haven't you?

A. Yes.

Q. And that correspondence is all with reference to the business activities of Benguet since 1940, isn't it?

A. No. If you put it that way, Mr. Scherer, having been a lawyer myself I know what you are after. That is not true. We do not, and have not done business in the state of Ohio in any way, shape or form. It is possible that we [fol. 189] bought some machinery here from some firm in

Columbus. I have a faint recollection that when Mr. Peterson was here on a visit, before he went out there I talked to him, and drove him around here in Cincinnati to those various tool companies. I was proud of our facilities here, and remember prior to the war we had machinery out there from Cincinnati. We went around several places, and I think he saw something that he thought he could use, and I think he gave them an order. Now that is the extent that I know. We bought machinery in New York, in Denver, Colorado, in Wisconsin, in California, wherever we could get it—Washington, the Worthington Iron Works.

Q. My question was with reference to this volume of correspondence you brought here today——

Mr. Mercier: I object to the use of the word "volume".

Witness: I would like to answer that.

The Court: The question was not finished, there was an objection, and Judge Haussermann expresses a desire to answer. Let Mr. Scherer finish the question, and if there is an objection I will rule on it; and then the judge can answer.

By Mr. Scherer:

Q. I am asking you whether or not that correspondence that you brought from your files at New Richmond, whether or not that correspondence deals with the business activities and management of this company over that period of time?

A. It does not. In so far as the letters or correspondence to individuals here in the United States it does not. That is the reason I said I wanted to be very careful. I can't say that the letters I wrote to Mr. Peterson did not have some-[fol. 190] thing to do with the activities; he would write and I would answer, and wanted to know what was going on.

Q. In your capacity as president and general manager, Mr. Peterson would ask your advice would he not, on certain matters?

A. It is pretty strong to say "advice". He would sometimes ask my opinion about the things he was doing.

Q. And you would reply and give him advice as to the operation of Benguet?

A. Yes.

Q. Was your answer yes?

A. If it called for something with reference to the operation. We have no operations in Ohio or any other state excepting to buy machinery and supplies; if that constitutes doing business in Ohio I have to stand by it. We are engaged in mining, and it is all done over in the Philippine Islands; but we do need supplies, and purchase them here in the United States, because we need them for our operations out there. I have bought some things in Belgium—I mean Benguet has bought some things in Belgium—over my objection because I didn't like the idea of buying things in Belgium when we could furnish the same thing, but the superintendent said they were exceptionally good cars, and he would like to get them, so I bowed to him. But I don't consider that doing business in Belgium.

Q. What records of Benguet do you have in your files at New Richmond?

A. I tried to answer your subpoena. I think all I have that can be considered records is the stub book, the check book, unused check book on Account No. 1 and No. 2, and a few cancelled checks. All the cancelled checks have gone to the auditor in the Philippines, and the rest is what I [fol. 191] retained because I call it my personal property, but I have everything of that nature here.

Q. Personal property in so far as it refers to Benguet business?

A. Oh, that. I wanted to be informed, of course.

Q. Now these cancelled checks on the accounts to which we referred; do you have those with you?

A. A part of them, as I said, a few. All of them were sent back there, but I have retained some here because when this matter was pending before the SEC they required a balance sheet as near as we could make it, and it was made up by some auditors in Washington, D. C.; but everything was sent that I had covering the year 1946, and I felt they should remain here in the United States until that matter was settled.

Q. Do you have the cancelled checks——

A. They were in Washington, and I think we have them.

Q. Do you have the cancelled checks for the last six months preceding April 4?

A. I would not say six months. I don't know how many, but I have some cancelled checks.

Q. Could we see them?

Mr. Mercier: The 1946 checks are in the Philippines; the stubs are here, if you want to see those.

By Mr. Scherer:

Q. May I ask, when were the 1946 checks returned to the Philippines?

A. I don't remember that.—The 1946 checks?

Q. Yes.

A. I don't remember that. I thought—when was that balance sheet for the SEC—was that 1945 or '46?

Mr. Mercier: 1946.

[fol. 192] A. (Continued): I thought we retained here in the United States the checks that involved the balance sheet filed with the SEC because I thought that maybe the auditors or someone with the securities commission wanted to examine them, and thought I had better keep them; but a list of those checks did go to the Philippines for our auditing purposes there.

Mr. Scherer: I suppose that after the court is adjourned we can examine these for cross examination tomorrow, rather than take the time now?

Mr. Mercier: Here is the correspondence prior to April 4.

—By Mr. Scherer:

Q. Now Miss Gordon here in the court room, she was in 1946 assistant secretary of Benguet Consolidated, was she not?

A. While the application was pending in the Securities and Exchange Commission she was assistant secretary.

Q. And she was paid with Benguet funds?

A. During that period of time.

Q. And she has never been in the Philippines has she?

A. No.

Q. She is your secretary out at the office in the New Richmond Bank?

A. She has been my secretary for I think four or five years.

Q. And during the time she served you out there in 1946 she was on the Benguet payroll?

A. I don't know whether she was on the Benguet payroll or not, but she was paid by the Benguet.

Q. And where does she live?

A. New Richmond, Ohio.

Q. How long has she lived there?

A. I don't know.

Q. As far as you know?

A. I don't even know that. Mrs. Haussermann was [fol. 193] aware of the fact that I was having trouble getting secretaries in Cincinnati to come out to New Richmond, and she said that there was a young lady living there who worked in Cincinnati. I said to send her around, and she did, and I hired her.

Q. And as far as you know, she has always been in Cincinnati and New Richmond, all her life; is that right?

A. I think she calls herself a Chicago girl.

Q. You said while she was assistant secretary for Benguet during 1946, she was paid from Benguet funds; of course during that time she was doing work for Benguet, wasn't she?

A. Yes. I should correct that. One-half of her salary while she was assistant secretary was paid by Benguet and one-half by Balatoc. She was also at that time assistant secretary for Balatoc.

Q. That is a Philippine corporation, too?

A. That is a Philippine corporation engaged in the mining business.

Q. Of which Benguet owns sixty-five per cent?

A. Sixty-four and one-half per cent.

Q. And she was paid for service during that time, rendered to Benguet and Balatoc?

A. Yes.

Q. You also had another secretary, or stenographer, in your office?

A. Since this suit was commenced it became necessary to do a lot of copying, and I asked Miss Gordon to get somebody to help out, and she got Miss Schlenz.

Q. You had another stenographer or secretary prior to that time did you not?

A. No.

Q. Now did you pay Miss Gordon from these two accounts?

A. No. 1 and 2, while she was assistant secretary, I think all that time. I mean No. 1 and No. 3 accounts; No. 3 was the Balatoc account.

[fol. 194] Q. You signed those checks, did you not?

A. Oh, yes.

Q. Other than correspondence, Judge Haussermann that you brought in response to the subpoena, and these cancelled checks, what other records did you bring?

Mr. [redacted]ong: We object.

The [redacted]urt: Objection sustained. You have a right to ask if he brought anything called for by your subpoena.

By Mr. Scherer:

Q. Benguet had an office in San Francisco, in the Hobart Building up until what time?

A. Benguet had an office there prior to the war. That was an office there of a man by the name of Gerry who was our purchasing agent, and he had an office there in that building and had a sign on there Benguet Consolidated Mining Company, and in some proceeding under the compensation law or something like that, the tribunal, whichever it was, said that that fact made Benguet have an office there in San Francisco. We at once had him take it off. It was not intended to be there, but he had put it on so the public would know where to locate it. He was our purchasing agent at the time.

Q. When that office was closed—all the records of Benguet in the United States were kept in that office, were they not?

A. What's that?

Q. All the records of the Benguet Consolidated Mining Company in the United States were kept there were they not, in that office?

A. You use the word "records". We had no records, that I call records; the purchasing orders, and copies of bills-of-lading and things like that were in that office, but

the records, the official records, the final records were all over in the Philippines, sent there when the various shipments were made.

[fol. 195] Q. All the correspondence or other papers that were in that office, which occupied many, many files, when that office was closed in 1939 they were all sent to your office here in New Richmond, were they not?

A. Not in 1939.

Q. When were they sent?

A. When the war broke out in 1941 Mrs. Baumann wanted to know what to do with the records. I did not know of any place where I could have them, and I built a concrete building, a small one, and had her to ship them there and kept them until the war was over, and when the war was over I sent them back to San Francisco.

Q. That was here in Ohio?

A. Here on Pond Run farm.

Q. And some of these are still in your office are they not?

A. No, not to my knowledge; if they are it is by accident. I don't think so. I would have no use for them here.

Q. Did you bring any of the purchase orders, or copies of purchase orders with you?

A. I think I brought what I have got in my office, what I call my retained copies; the original and duplicate went back to Mr. Baumann when they were signed, but I kept one.

Q. Could we see them, please?

A. Yes, if I have got them you can.

Q. I want to show you this file of purchase orders, or copies of purchase orders for the—let's see, from March of 1946 all the way through '46 and '47 until date. It has Benguet printed on it, and authorized by John W. Haussermann; is that right?

A. Yes, that is right. As I explained to you on my other examination, Mrs. Baumann did all the negotiations, and when the orders were placed she sent the original and a [fol. 196] duplicate, and one for me, to sign, and I signed and sent back all excepting the one that I retained. This shows on there, "Ship and invoice addressed to the company at Manila, P. I., but address all correspondence and forward duplicate documents when shipment made to E. M. Baumann, 402 Hobart Building, San Francisco 4, California, where payment will be furnished.

Q. That is just one.

A. They are all alike.

Q. They were sent to you here at New Richmond?

A. Yes.

Q. For your signature?

A. Yes, sir, because as I told you before, the suppliers wanted an officer to sign them, which I think was perfectly proper.

Mr. Scherer: I would like to have these marked as an identification exhibit.

(Same was thereupon marked for identification A, 8-4-47.)

Q. Did you bring with you the copy of the payroll records, the original——

A. I have no payroll records of any kind, nature or form.

Q. Any record of payments made to employees of the Benguet?

A. I made no payroll records at all. I did remit to the wives at their request. Payments were made out there, except what was deducted by reason of payment to the wife.

Q. Do you have a record of the payments made here by you?

A. Oh, yes, the checks and stubs show, and every month that is reported to the Philippines for our office records there. I simply report that I complied, and say what I did with the money. Some ask that it be deposited in some bank, and some goes direct.

[fol. 197] Q. Do you have a separate record of that, other than the check stubs?

A. I don't think so.

Q. You just testified that you paid Miss Gordon while she was assistant secretary; do you have a record of those payments?

A. By the checks. I have no payroll or anything like that. She wouldn't let me go very far after the first of the month.

And thereupon, the hour for adjournment having been reached, court adjourned, and the further hearing of this cause was continued until Tuesday morning, August 5, 1947, at 10 o'clock.

Morning Session, Tuesday, August 5, 1947, 10 o'clock.

Mr. Scherer: If the court please, I have talked with counsel for the defendants, and they have agreed that in order to expedite this matter, the various batches of correspondence could be introduced eventually in our case in evidence, without asking Mr. Haussermann concerning each individual piece of correspondence. They have also agreed that the copies that are in Judge Haussermann's files may be introduced, and they will take no exception if the originals are not there. That will save us considerable proof this morning, showing that the originals are out of the jurisdiction of the court.

Mr. Long: He didn't quite state that fully, if the court please. That is to apply only to such letters, correspondence, etc., which antedates April 4.

Mr. Scherer: That is understood.

The Court: I think under my ruling yesterday, anything that was subsequent to the date of the attempted service would be incompetent unless it related to something, that was prior.

[fol. 198] Mr. Scherer: And I understand that when we get to our case, you will agree that the copies that we have, in so far as these orders, are true and correct copies?

Mr. Long: We have agreed they are admissible in evidence; all you have to do is to identify them.

Mr. Scherer: Will our agreement apply to the copies of the board of directors meetings?

Mr. Long: Yes, everything.

By Mr. Scherer:

Q. Now Judge, will you tell us again who E. M. Baumann is?

A. The purchasing agent we called her, in San Francisco.

Q. I am going to show you a batch of correspondence from your files, containing original letters and copies of letters between you and Mrs. Baumann and your office and Mrs. Baumann. Will you state whether those are copies of correspondence between you and Mrs. Baumann?

A. I assume so.

Q. These came from your files?

A. Certainly.

Q. At New Richmond?

A. Yes.

Q. And they cover a period do they not, from September 27, 1945—that is the date——?

A. That seems to be the date on the first one.

Q. Until March 31, 1947?

A. Yes.

Mr. Scherer: I should like to have them marked for identification, if the court please.

(Same was marked for identification "B 8-5-47".)

Q. I am again referring to identification "A 8-5-47" which we discussed yesterday, the papers in this file; they are purchase orders of the Benguet are they not, from March 25, 1946 until April 3, 1947?

A. They are my retained copies, yes.

Q. Copies of the originals?

A. Yes.

[fol. 199] Q. And those are the copies that were retained in your file at New Richmond?

A. They were.

Q. I believe I asked you yesterday, the originals were signed by you, were they not? Your name on these copies is just typed.

A. Yes. The name was typed on all of them, but I signed the original and duplicate.

Q. Judge, what is Mr. Peterson's first name?

A. Joseph.

Q. And he is—you call him the chief of staff in the Philippines?

A. I do, yes.

Q. I have here another batch of files. I am going to show you this first file, which contains a number of letters—(Will you please mark them for identification)——

(Said file was thereupon marked for identification "C 8/5/47".)

Q. (continued) The file itself is designated as "Peterson", is it not?

A. It is.

Q. And this is a file from your New Richmond office?

A. From my office.

Q. And this is correspondence between you and Peterson from May of 1946 through December of 1946?

A. It is.

Q. And of course all of this correspondence is with reference to Benguet Consolidated Mining Company, isn't it?

A. Not all of it, no.

Q. You mean there are some personal matters?

A. Some personal, and some with reference to the Peoples Bank, and some about Balatoc and some the Heald Lumber Company, and some on the general political situation in the Philippine Islands.

Mr. Scherer: We will agree that we will not refer to any of the correspondence which Judge Haussermann men-[fol. 200] tioned, and will not cite anything in any of those letters.

Mr. Mercier: While we agreed, if the court please, that these could be introduced in evidence, as a matter of fact probably not half of that correspondence has to do with Benguet. It is political and personal matters, the Heald Lumber Company, Consolidated Mines, the political situation, Peoples Bank, Agno Power Company and everything else. It is all mixed up in there.

Mr. Long: I think that the court will agree with me that if we reserve our right to object to any one of these letters which is not material to this issue, that will end the discussion. Mr. Scherer may offer any document or record that he wishes to, which antedates April 4, with our reservation of a right to object to any document if it does not appear to us to be material to the issue.

Mr. Scherer: That is agreeable, if the court please.—I would like this file marked for identification.

(Said file was thereupon marked for identification "D 8/5/47".)

Q. I am going to show you another file, Judge, containing correspondence, and which has been marked for identification "D 8/5/47", and ask you whether or not this is a file from your office in New Richmond?

A. That is a part of my personal files in New Richmond.

Q. It is a file that is designated as "Peterson's letters"?

A. That is true.

Q. And that is correspondence between you and Mr. Peterson?

A. It is.

Q. And that correspondence runs from September 1946 to January 1947; is that right?

A. That is right.

[fol. 201] Q. And I show you, Judge, also another file—(please mark it for identification)——

(Said file was thereupon marked for identification "E 8/5/47".)

Q. (continued)—containing correspondence, which has been marked for identification "E 8/5/47", and that file—there is no tab on it, but is that also from your files at New Richmond?

A. That is part of my personal files.

Q. And that is correspondence between you and J. S. Peterson, is it not?

A. Yes, plus, if you will notice in there, some letters to me from my employees, Philippine employees.

Q. You are referring to the letter in which they thank you for the increase in salary?

A. Yes.

Q. Now those——

A. They were sent to me by Mr. Peterson.

Q. And that correspondence in this file is from January 24, 1947, to March 8, 1947?

A. That is right.

Q. I will show you another file—(please mark it also.)

(Said file was thereupon marked for identification "F 8/5/47".)

Q. (continued)—which has been marked for identification "F 8/5/47", and ask you whether that is from your file in New Richmond?

A. Yes, that is part of my personal files, and is from Mr. Peterson.

Q. This is designated "Peterson letters 131-140"?

A. That is right.

Q. And that correspondence extends over a period from March 10 to April 2, 1947?

A. That is right.

Q. And again I show you another file containing a batch of letters—(please mark this also)——

[fol. 202] (Said file was thereupon marked for identification "G 8/5/47".)

Q. (continued) marked for identification "G 8/5/47", and ask you whether or not this file is from your files at New Richmond?

A. Yes, part of my personal files.

Q. And that is designated "Joseph Peterson" on the file?

A. Yes, sir.

Q. And that contains the correspondence from February 24, 1945 to April 29, 1946?

A. That is right.

Q. I have another file here—(please mark it)——

(Said file was thereupon marked for identification "H 8/5/47".)

Q. (continued)—marked for identification "H 8/5/47", and ask you whether or not this file is from your files at New Richmond?

A. Yes, that is part of my personal files in New Richmond.

Q. And that file contains minutes, does it not?

A. Copies of minutes.

Q. Which have been signed by you and Rose T. McKee, and Jean Gordon of board of directors meetings of the company?

A. Yes.

Q. Board of directors meetings as of December 2, 1946; as of July 3, 1946; March 15, 1946, and here is one October 1945; May 25, 1945; and May 19, 1945; is that right?

A. Yes; I assume you read them right.

Q. It also contains, Judge, a record of the minutes of the board of directors of June 12, 1944?

A. Yes.

Mr. Scherer: I wish to make a correction there. I read a communication dated May 19, 1945, which was in this file with the minutes as the minutes of a board of directors meeting, and it's not a board of directors meeting but a communication.

[fol. 203] Q. Judge Haussermann, during the year 1946, you, on behalf of Benguet Consolidated Mining Company, attempted to register the securities of Benguet with the securities division of the state of Ohio, did you not?

A. As you stated it, no, I did not, and Benguet did not. I can explain that. Some of our shareholders, Allen and Company who owned a bunch of shares of the Benguet Consolidated Mining Company, wanted to have all they owned registered at their own expense, and I had no objection to it, because—and he said it required information and data, and I agreed to furnish that to him. Benguet was not interested in the registration at all, excepting they furnished such information that the Securities and Exchange Commission or anybody else wanted.

Q. Well, you appeared, Judge, did you not, at the hearing?

A. I did.

Q. And you requested, personally, on behalf of the company, the registration, did you not?

A. I did not.

Q. You did not?

Mr. Mercier: What date, where was it and when; will you please specify?

By Mr. Scherer:

Q. Do you recall what date that was that you did appear in Columbus before the securities division?

A. Columbus, Ohio? No, I don't remember it. I know I did appear there, but I don't remember the date.

Q. Well, it was in the year 1946, was it not?

A. I think so. I don't remember that, but the record will show when I appeared there. Mr. Scherer, when you asked about the Securities and Exchange Commission, I thought you meant the registration in Philadelphia. I had nothing to do with the Columbus matter, neither [fol. 204] did Benguet, and was surprised when I found out by the newspapers that an application had been filed. I thought you had reference to the Securities and Exchange Commission in Philadelphia. I was called there as a witness.

Q. You mean you were called in Philadelphia or Columbus?

A. Let's get this straight. Allen & Company owned a bunch of shares, about seven hundred and some odd thousand shares, of Benguet stock which they wanted registered in the Securities and Exchange Commission in Philadelphia. That is the Federal Securities and Exchange Commission. They were shareholders, and they asked me to go through the form of furnishing whatever information we could to the Securities and Exchange Commission in Philadelphia, which I agreed to do, and did.

Q. Well, who attempted to register Benguet securities with the Ohio Division of Securities? Who did that?

A. I don't know of my own personal knowledge, but I think some firm in Cincinnati—Cohle and something. I had nothing to do with it, and was surprised when I found somebody did. I think there is a firm of brokers here in Cincinnati—perhaps my counsel could help refresh my recollection on that.

Q. Well, in connection with that attempt to register those securities with the Division of Securities of the state of Ohio, you did have some correspondence with the division, did you not?

A. Maybe I did, I don't know. Maybe they asked me something, but I don't remember it.

Q. Well, maybe if you look at this letter addressed—marked for identification "I 8/5/47", addressed to the [fol. 205] chief of the Ohio Division of Securities, State Office Building, Columbus, Ohio, dated June 25, 1946, and signed John W. Haussermann—maybe that will refresh your recollection, Judge.

A. Yes, that is a letter. May I read it? I would just like to see what it is all about.

Q. Yes.

A. This letter was after the informal conference here, and I was afraid that the chief of that division perhaps misunderstood and I thought he should be informed just exactly, and I put it in the form of a letter.

Q. You refer in that letter of June 25 to an informal conference with the chief of the Securities Division, which you had previously with him in his office at Columbus?

A. That is true.

Q. Not a conference here in Cincinnati?

A. No, it was in Columbus.

Q. This then is the letter where you conclude and say, "You know this company is my baby, and I am very jealous of its reputation"?

A. You bet you!

Q. Now this letter to which we have just referred, Judge, is in a file which was marked for identification "I 8/5/47", headed "Ohio Securities Commission"?

A. That is my personal file, my retained papers in New Richmond, Ohio.

Q. From your file at New Richmond?

A. Yes. You will notice that is all personal. I signed it personally.

Q. But it refers to the Benguet Consolidated Mining Company?

A. Yes. Any official is entitled to know the facts, and I took it upon myself, when I thought there was confusion, to put it in writing so he would understand. I thought it was due me, and due him. Incidentally I might add that our informal conference was a friendly one. He [fol. 206] knew I had nothing to do with it, but I was there, called and gave all the information I could.

Q. Judge Haussermann, I believe you testified yesterday that Miss Gordon, who lives in New Richmond there, was assistant secretary of the company—she is not assistant secretary at the present time, is she?

A. No. She was assistant secretary during the time that the application was pending for registration, filed before the Federal SEC—Securities and Exchange Commission in Philadelphia.

Q. Do you recall when she ceased to be the assistant secretary of Benguet?

A. I do not remember the date.

Q. Well, she was assistant secretary as late as May 1, 1947, was she not?

A. Yes, sir, possibly; I don't know.

Q. I will show you another file—(please mark it)—

(Said file was thereupon marked for identification "J 8/5/47".)

Q. (continued) —and ask you whether or not that report to the Securities and Exchange Commission—I meant to say that on the outside it is designated to the Securities and Exchange Commission of Philadelphia, Pennsylvania, Annual Report for the calendar year ending December 31, 1946, and ask you whether or not that report to the Securities and Exchange Commission does not show that Jean Gordon was assistant secretary as of May 1, 1947?

A. This shows it. That is the retained copies of the balance sheet as I recall it, filed with the SEC whose office is in Philadelphia, prepared by the auditors in Manila.

Q. Now if she was secretary of May 1, 1947, after you have refreshed your recollection, do you remember when [fol. 207] she ceased to be assistant secretary?

A. I am sorry, but I don't remember. I never considered it a serious matter.

Mr. Mercier: I object, if the court please. It has no materiality to it.

The Court: Well, the question has been answered. I will let the answer stand. The judge says he doesn't remember.

By Mr. Scherer:

Q. Judge, I am going to show you another file which has been marked for identification "K 8/5/47", and ask you whether or not this file is from your files in the New Richmond?

A. Yes, that is part of my personal files covering the expenditures.

Q. It is designated "Licenses, Expenditures of Funds for Balatoc and Benguet"?

A. Yes.

Q. That involved expenditures for your accounts were blocked by the Foreign Funds Control Division of the Treasury Department?

A. Oh, yes, they were blocked right in the beginning of the war, I think. You have got me on the dates.

Q. This correspondence extends over a period from December 7, 1941 to January 25, 1946?

A. That is true; it so states there.

Mr. Scherer: Now in this file of course, your Honor please, happen to be some communications between Mr.

Mercier and Mr. Haussermann; we realize they are privileged and can be——

Mr. Mercier: We have no objection to them. We withdraw any privilege.

By Mr. Scherer:

Q. Judge, I will show you a check book—(please mark it)——

[fol. 208] (Said check book was thereupon marked for identification "L 8/5/47".)

Q. (continued) —marked for identification "L 8/5/47", which contains at this time only stubs, and ask you whether or not that is a check book of Benguet Consolidated Mining Company.

A. This is the check book of the president account No. 1 at the First National Bank of Cincinnati, the stub book which I consider part of the Benguet records, and it pertains to account No. 1.

Q. The No. 1 account is a Benguet account?

A. Yes.

Q. And those are stubs of checks issued in your office at New Richmond, are they?

A. Some issued there, or wherever I traveled. I took that with me everywhere I went, some issued in Washington, some in New York; San Francisco, wherever I happened to be.

Q. But some were issued at New Richmond, Ohio?

A. Oh, yes.

Q. Is this writing here, this sheet, Miss Gordon's?

A. It is not mine. I think most of them are in Miss Gordon's writing.

Q. But the book was kept at New Richmond, was it not?

A. Wherever I am, that book is—when it had blank checks I carried it with me wherever I traveled, but now because it has no checks in it, I leave it there—I don't carry it with me. Perhaps I should explain. I carried that book with me all the time; when we made short trips I would take with me some blank checks so as to avoid the necessity of taking it along, but when we were away for any length of time of course I took the book.

Q. I will show you another check book—(please mark it)——

[fol. 209] (Said check book was thereupon marked for identification "B 8/5/47".)

Q. (continued)—marked for identification "M 8/5/47", with some blank checks in it and stubs, and ask you whether or not this is a check book of Benguet Consolidated Mining Company designated as John W. Haussermann President Account No. 1?

A. Yes. That is the same as the other one, President No. 1 First National Bank, Cincinnati, which still has some blank checks attached to it.

Q. And whose handwriting is on these stubs?

A. Well, I assume most of them are in Miss Gordon's handwriting. I did not write any of them. Maybe some in Mr. Mercier's writing. I haven't examined them sufficiently to say.

Q. But you personally signed all of the checks that were issued from those two books?

A. I did.

Q. Who was Rose McKee?

A. A lady who lives in Leavenworth, Kansas.

Q. And what position did she occupy with the Benguet Consolidated Mining Company?

A. Secretary of the Benguet.

Q. Is she secretary today?

A. And secretary of Balatoc.

Q. Secretary of Benguet and Balatoc both?

A. Yes; and I think of the Heald Lumber Company also, but I am not so sure about that.

Q. How long has she been secretary of the Benguet, Balatoc and the Heald Lumber Company?

A. Several years before the war; I don't remember when she became secretary, but her sister was secretary before her.

Q. I show you another file—(please mark it)——

[fol. 210] (Said file was thereupon marked for identification "N 8/5/47".)

Q. (continued)—marked for identification "N 8/5/47", and ask you whether or not this is a file from your New Richmond office.

A. It looks like it, yes. That is part of my personal files in New Richmond, marked "Rose McKee".

Q. I believe you testified many many times that you had nothing to do with the purchase of machinery?

A. Absolutely nothing whatever.

Q. Well, is this a letter that you wrote to Rose McKee at Leavenworth, Kansas, October 4, 1945—copy of a letter?

A. I see so much—may I take time to read it?—This is a letter written October 4, 1945, referring to powers of attorney. I can't recall just what it is, but from this I assume powers of attorney executed in favor of Mr. Peterson and others, because I see it has reference to obtaining proper certificates that the notary was in fact a notary public; and I notice also that I refer to my son Francis having been operated on, and a note that Bob Barry at Manila had heart trouble, and about things at Manila.

Q. Do you remember writing this: "I am to remain here until all the machinery required is purchased and actually shipped. All feel that I can do more here in handling and purchasing and shipping of machinery than I could do in the Philippines"?

A. Absolutely, that is true; but I repeat that I had nothing to do with the purchasing, but was very much interested in trying to get the things over.

Q. Judge Haussermann, in the last two years have you, on behalf of the corporation, negotiated loans for the com-
[fol. 211] pany here in this country?

A. I will have to put it this way——

Mr. Mercier: You are limiting that to prior to April 4, 1947?

Mr. Scherer: Yes.

A. No. That is the reason I am saying it. I saw from reports in Manila that the funds I had here were rapidly becoming exhausted, and I conferred——

Mr. Mercier: His question was whether or not you negotiated any loans prior to April 4, 1947.

A. No, but I wanted to give the whole background.—No, strictly speaking, no.

By Mr. Scherer:

Q. Well, not strictly speaking, Judge, did you attempt to negotiate any loans for the company this year?

A. I can't speak the truth unless I tell you what happened.

The Court: Just go ahead and explain in your own way.

A. (continued) I saw from the reports that I was getting from Manila, and the machinery that was being bought, and the work that was going on in the Philippines, that some day before we actually turned over the wheels we were going to be—our funds will be exhausted; and I conferred with larger shareholders in New York long before this happened, with the idea that I thought something should be done in the way of increasing our capital stock. Those shareholders did not like the idea; they said, "Why not borrow the money?" "Well," I said, "we can't borrow any money here in the United States, the condition things are in". "Well", they said, "we think you can". Well, that went over. My funds did become exhausted as the [fol. 212] records show here, and then some of the shareholders—that was after this suit was commenced—called me to New York and that is when the real negotiations for the loan started and were consummated.

Q. Judge, the New Richmond National Bank Building, who is that owned by?

A. It belongs to me.

Mr. Scherer: If the court please, the question I am going to ask may appear incompetent, but I will connect it up later.

Q. In the bank downstairs you have murals or paintings of the Philippine Islands on the walls, do you not, scenes from the Philippines?

A. No, not scenes from the Philippines. There is a picture of the Benguet Consolidated Mining Company painted on one of the walls.

Q. That is of the properties in the Philippines?

A. Yes.

Q. That is in the bank downstairs, is it not?

A. In the banking room, yes.

Q. That has been referred to in the Philippines as the Benguet Bank, has it not?

A. No, I never heard of that.

Q. Haven't you heard that spoken of in the Philippines as the Benguet Bank?

A. No; they don't know anything about that bank.

Q. In July of 1945, do you recall Idonah Slade Perkins visiting you at the bank?

A. I do—not the bank, but at my office in the bank building.

Q. At your office in the New Richmond National Bank Building?

A. Yes.

Q. That was on the second floor, your office?

A. Yes, it was.

[fol. 213] Q. That is not a bank office, is it?

A. No. I do banking business there, but I do not consider it a banking office; it is my office, my name is on the door.

Q. With her at that time was a Mrs. Parsons?

A. I don't know who it was; some woman came with her.

Q. That was about a month before the end of the Japanese war was it not, July 1945?

A. Mr. Scherer, I don't recall; it was perhaps a year or so ago; I don't remember.

Q. But in July of 1945 the Philippine Islands had been retaken had they not? They were in the possession of the Americans?

A. I think so, yes. MacArthur landed some time in 1945. Just when the last battle took place I can't recall, but sometime in 1945.

Q. Prior and up to March—up to April 4, 1947, you personally had paid the salaries of Mrs. Baumann, Miss McKee and even Peterson, had you not?

A. How is that?

Q. Not personally. I will withdraw that. For and on behalf of the company, Judge, prior and up to April 4, 1947, you paid Miss McKee, Mrs. Baumann and Mr. Peterson, did you not, out of company funds?

A. Yes, as long as there were company funds here in my possession, Mrs. Baumann—I paid her by check on No. 1 and No. 2. She was also working for Balatoc. Peterson, I never drew a check here for him. He would send word every month what he needed in the Philippines, and I sent a lump sum and he paid himself and everybody else, excepting what he wanted deposited here in some bank, or paid to the wives.

Q. From 1940 to April 4, 1947, you also received a salary from the company did you not?

A. From what dates did you say?

[fol. 214] Q. 1940 to April 4, 1947, you received a salary from the company did you not?

A. Yes, from both Benguet and Balatoc.

Q. And that was about two thousand a month, wasn't it?

A. Thousand from each company. Since the funds became exhausted in the United States there was nothing here to pay me.

Q. I am asking up to April 4, Judge. And your salary was paid from these accounts to which we have referred? I mean the accounts which were in the New Richmond National Bank and the First National Bank of Cincinnati?

A. Well now, I collected up to the time that the funds were here, every month, a thousand dollars from Benguet and that was drawn on account No. 1. I think all the checks were on the First National Bank; some may have been on the New Richmond Bank, but I don't know. And I also drew a check——

Q. From the same account you paid Francis, your son——

A. He was only paid when he was sent to the Pacific Coast to meet the returning staff and their families—about three or four months I think it was.

Q. You paid him from these accounts about which we were talking?

A. Yes, certainly.

Q. And Miss Gordon?

A. While she was assistant secretary, yes.

Mr. Scherer: I think that is all the questions I had to ask just now.

Redirect examination.

By Mr. Mercier:

Q. Mr. Scherer asked you the question, did you pay the salaries of Miss McKee, Mrs. Baumann and Mr. Peterson; does Miss McKee get a salary?

A. No.

[fol. 215] Q. So you did not pay her?

A. No. She has drawn no salary since the war.

Q. Now, Judge, you have been questioned a good deal about that office in New Richmond, Ohio. How much of your time do you spend in that office—in the period, say from 1942 until April 4, 1947?

A. Now let me explain that in this way: Every time that I came home during normal times on a visit, I always had what I called an office. There was no club in New Richmond, and the only place I could go would be a saloon. I always wanted some loafing place where I could meet my friends, and I always had—and the public there would have access to it. Now when I came back in 1941 I think—yes, 1941 on that vacation, I had an office in one of my own buildings there in New Richmond. Then the bank needed a building, and we discussed it, the board of directors, and I was president of the bank, and owned more than half its shares, and I didn't think I wanted to take the bank funds to build the kind of a building I thought the bank should have. Consequently, along about 1942 or 1943 we erected that building. I erected it at a cost of about $68,000.00, and I gave the bank a lease—a lease on the building I mean for twenty years, with the privilege of purchasing it any time within the twenty years, at exactly the amount that it cost to erect it. Under that lease they collect the rents from all of the offices upstairs, including mine; and I reserved one for my office but didn't like taking it without pay, and I paid the bank rent for that office.

Q. Is that office still used as a loafing place as you call it?

A. Come up some time and you would think it was a loafing place!

[fol. 216] Q. Are there any business people connected with Benguet that ever come to that office?

A. Oh, there is no one around there connected with Ben-

guet. Of course, some of our New Richmond people are shareholders, and come up personally, but no business of Benguet is done there by anybody.

Q. Has there ever been a supplier of machinery or equipment to be used in the Philippines come to your office?

A. Never.

Q. Has there ever been a business person that had anything to do with the business affairs of Benguet Consolidated Mining Company ever come to that office?

A. No, I can't recall of a single one. Perhaps I should say that some people we have bought from visited Pond Run Farm at some time since I have been here, but never on any business.

Q. How much of your time, Judge, are you in New Richmond, or Cincinnati, Ohio, or in the state of Ohio, since 1942, or 1941 when you came up here, up to April 4, 1947?

A. Well, until we had all the Philippine legislation attended to, I was pretty much in Washington or New York, practically all the time. I would come home over a week-end, or when things were not pending there. I think I can truthfully say that more than half my time has been spent away from New Richmond, or from Ohio, as far as that is concerned, while I have been here in this country since 1941.

Q. Now these check stubs that have been identified, were they all written, or signed by you, in the state of Ohio?

A. No, not all of them. As I explained I took the book with me, or some blank checks, and they were written wher- [fol. 217] ever I happened to be—San Francisco, Washington, New York, Philadelphia—I think some in Chicago, Kansas City, wherever I was. When they wanted money I sent it to them.

Q. Now these orders in that folder marked for identification "A 8/4/47", did you ever have anything to do with the negotiating for any one of these orders?

A. I did not.

Q. At any time?

A. At no time, either before the war or since the war.

Q. Did you ever have any correspondence so far as your knowledge goes, with any one of these people who are the suppliers named on these orders?

A. No, I can't recall—I know I had no correspondence with reference to any pending order or attempt to get an order. I recall that I had correspondence with the Bethlehem Steel Company.

Q. When was that, if you recall, Judge?

A. Oh, this year some time.

Q. Wasn't it about the time this suit was filed?

A. Yes. They surprised me—I got word from Mrs. Baumann that they wanted a cash down payment; and I had been doing business with them so long I took it up with them and thought something had happened. They brought all sorts of excuses, and then I realized this suit was pending and I complied, and told Mrs. Baumann we would bow to the seller's market and sent the money.

Q. These orders, Judge, are for machinery, supplies and equipment?

A. Oh, of course.

Q. What are these supplies and equipment needed for?

A. For the operation of the mine. All our machinery and [fol. 218] buildings, excepting a bit of our equipment, were destroyed during the war, and we had to reconstruct the whole thing, and are still in the course of reconstruction.

Q. Would you say most of this machinery, or a part of it, is used underground?

A. Practically all for the mill is underground.

Q. Who is erecting that mill in the Philippines?

A. Well, the mill is being actually constructed by our staff through Mr. Peterson the chief of staff. He was a Balatoc superintendent prior to the war. Mr. Lenox has charge of the technical construction there.

Q. What companies are erecting it?

A. Balatoc and Benguet. It is a central mill.

Q. Did Mr. Peterson indicate how he appraised or charged up the cost of erection?

A. Well, he was corresponding about that, and when he was here on the west coast we talked about it, but I hadn't given it much consideration.

Q. What was his idea about it?

A. I think his idea was about two-thirds Balatoc and one-third Benguet, because Balatoc had a much larger milling capacity prior to the war.

Q. Therefore, two-thirds of the machinery covered by the orders would be for Balatoc?

A. Well, yes. What I mean is, they will ultimately pay about two-thirds of it.

Q. Now, then, Judge, are these orders all on Benguet Consolidated Mining Company blanks?

A. Yes.

Q. Do you know what the company officers in Manila do with reference to charging up of these orders?

A. I get the reports every month, and the funds are sent [fol. 219] to Mr. Peterson as agent, and a part of it is spent for Balatoc; the part that is spent for the Agno Power Company is charged to them, and the part that is spent for Benguet is charged that way.

Q. And some to the Heald Lumber Company, is it not?

A. Yes, to the Heald Lumber Company.

Q. And this machinery when it arrives, Mr. Peterson orders it charged to the place it belongs?

A. That is true.

Q. Now, is there any other organization that might be covered by these orders besides Balatoc and the mill?

A. Oh, yes; Consolidated Mines.

Q. How about Heald Lumber?

A. That is one, too.

Q. Agno Power Company?

A. Yes.

Q. What companies own that?

A. One-half Balatoc and one-half Benguet.

Q. So that these orders, besides being for the mill, two-thirds of which will be paid for by Balatoc, also cover Heald Lumber Company, Consolidated Mines and the Power plant?

A. Yes, that is true.

Mr. Scherer: I would like to object, if the court please. Mr. Mercier has been testifying, and I understand he can only ask direct questions.

Mr. Mercier: We had closed our side, and he was subpoenaed on Friday when he could have been subpoenaed four or five weeks before, but they worked Friday, Saturday and Sunday to get these records. He has been subpoenaed to bring the records by the plaintiff, to be a witness for the plaintiff. I think I have a right—I know what the

proper way of conducting an examination is, but in view of the fact he is here under subpoena I think I have a right to put leading questions.

[fol. 220] The Court: The court granted the right to further cross-examine. He is still a defendant, and you are his representative. You cannot in Ohio ask your own witness leading questions at any time.

Mr. Mercier: Very well, your Honor.

Q. These board of directors' meetings that have been put in, six in all, prior to April 4, 1947, were any of these meetings ever held in your office in the New Richmond Bank Building?

A. I don't think any was ever held there; whatever meetings were held in Ohio were held at my farm, Pond Run, my home.

Q. Do you recall, out of these six meetings prior to April 4, 1947, how many were held at Pond Run farm?

A. Oh, I don't remember, but I don't think more than two or three.

Q. Would it refresh your recollection if I show you the file that has been identified here?

A. Yes. There seem to have been four.

Q. Four held where?

A. At Pond Run farm in Clermont county, Ohio.

Q. Were they held at the farm, or do the minutes recite that? Was it telephoned——

A. The meeting was held at Pond Run farm. I would like to explain.

Mr. Scherer: I object. They speak for themselves.

The Court: Objection sustained. I do not understand you can dispute the minutes of a corporation when properly certified by the proper officer.

Mr. Mercier: No, but you can show how the meetings were held, I would suggest.

The Court: The minutes, as I understand, show they were held at the judge's farm in Clermont county. I understand from your questions—and you may correct me if I [fol. 224] am wrong—that you want to show that what the minutes recite is not the fact, that they were not held there.

Mr. Mercier: I want to show that while the judge was at

Pond Run farm, actually the writing of the minutes was done in Washington, and the meeting was held by a telephone call to the people who were members, to see whether or not they would agree.

The Court: Objection sustained. You can put a profert in the record if you desire, but I think that is contradicting the minutes.

By Mr. Mercier:

Q. These four meetings at New Richmond, and how many elsewhere, and where were they held?

A. Waldorf-Astoria in New York. This one doesn't show where it was held—oh, yes, San Francisco, but it is not incorporated in the minutes.

Q. Yes, it is here.

A. I see. Palace Hotel, San Francisco.

Q. Does this one incorporate the place that it was held, on the face of it?

A. Washington, D. C.—I didn't look far enough.

Q. Judge, this correspondence that has been identified, do you know of anyone else in the United States who gets copies of those letters?

A. Oh, yes; I think you have copies of everything that I have, in your office in Washington, D. C.

Q. Are any of those company records?

A. The only company records that I consider that I have are those checks and check books. Everything with reference to the company is on file in Manila. In order that you may understand, if all of these things were destroyed ex- [fol. 222] cepting the check books, it would not interfere with anything. That is my personal possession, the information that I get. I am keeping track of it, and even send you copies of everything. I want to keep everything with me that I know refers to the company. I retain copies, my personally retained copies.

Q. How do you know how to draw these checks?

A. As I explained before, these funds were here. They were blocked. The funds that were in the accounts here as President No. 1 and No. 2 belonged to the Benguet Consolidated Mining Company. The expenditures of that fund accrued over in the Philippine Islands. What I mean by

that, the operations were going on in rehabilitation and reconstruction, and when they needed funds Mr. Peterson would cable me the amount he needed about the end of the month, and I sent the amount he required, and he distributed it where it was needed—payrolls, and purchases, and things like that. For the machinery that was purchased here in the United States Mrs. Baumann did the negotiation, on the requisition that she obtained from Manila, made all the contracts with reference to it, and when it came time to pay the people she sent me a letter or telegram saying to send so much out of account No. 1 in favor of so-and-so, whoever the person was, and I followed the instructions and issued the check.

Q. I hand you the correspondence identified as "B 8-5-47"; is this the correspondence of Mrs. Baumann pertaining to the issuance of these checks?

A. I assume it contains all the correspondence. Some may be checks. I haven't gone through it.

[fol. 223] Q. Suppose you look at it.

A. Here is one about the checks—no, it isn't. "As requested in your letter of March 28, I am enclosing herewith the following checks against account No. 1"—and a list of them—"and account No. 3"—and a list of them.

Q. You see here this letter of March 28; will you read that to the court?

A. "Dear Mr. Haussermann: The following checks are required for supplies en route to Manila. Account No. 3"—that is Balatoc, four checks, and the names are listed of the persons to whom they are to be payable. "Account No. 1"—three checks and the names. She listed the checks and the amount to be drawn.

Q. That is the way she always did it?

A. Yes.

Q. And then what?

A. "Will you please send checks for one thousand each on both No. 1 and No. 2 accounts to joint accounts of Wells Fargo; I am getting near to the bottom of the barrel".

Q. There is another letter?

A. March 20, "Please send check on No. 1 President account to cover the following shipping documents".

Q. She listed the checks?

A. Listed the checks and the persons to whom payable.

Q. And then what?

A. "Your personal check for $18,576.74 was received and deposited to the joint account No. 1 Wells Fargo, so to keep the records straight you should reimburse yourself for that sum, that is the No. 1 account." As I said before, as I said before, wherever I traveled I either took the book, or on a short trip I would take the checks. I found in one of my trips I did not take enough checks, and I sent my personal check and was reimbursed subsequently.

[fol. 224] Q. How many of these checks would you say were drawn on the request of Mrs. Baumann?

A. Oh, practically all, excepting the ones Mr. Peterson asked me to pay to the wives of the employees, and when Miss Gordon was working for the Benguet and Balatoc I issued checks in her favor, but that is about all.

Q. All the checks you drew, then, were drawn at the request of either Mrs. Baumann or Mr. Peterson?

Mr. Scherer: I object. He didn't say that.

The Court: He has a right to ask him. He may answer.

A. Yes, excepting those that I on my own accord paid to Miss Gordon, that was all, while she worked for Benguet and for Balatoc; and of course before the funds were exhausted I drew checks in my favor for my salary.

By Mr. Mercier:

Q. Your testimony is that the only ones you drew of your own accord were for yourself and Miss Gordon?

A. That is true.

Q. And the rest were at the request of Mr. Peterson or Mrs. Baumann?

A. Every one of them.

Q. Now, Judge, did you ever question the request for any of those checks?

A. No, I was not in a position to question them. I had nothing to do with them, and had confidence in my staff, and I assumed that when they told me to draw a check the money was due. I had confidence in them, and never questioned anything excepting the one instance when Mrs. Baumann told me the Bethlehem Steel Company wanted an advance payment, and I questioned it, but questioned it with

Bethlehem. I asked them, "What do you want that for?" That is the only thing I questioned. She informed me it was not an obligation, but a request cash down part payment before they would accept the order.

[fol. 225] Q. The salary payments to the employees' families and wives, did you do that of your own volition, or were you requested to do it?

A. Oh, when we were running normally, before the war, we had a bank account in San Francisco, a time account. Of course our accounts in the Philippines were in pesos. To transfer from one kind of money to another costs money; consequently as a matter of convenience to our employees, and also our shareholders who live in the United States, if they wanted their dividends drawn on the Wells Fargo dollar account, we accommodated them. Our employees, if they wanted part of their salary issued in the form of a United States check, or placed to their deposit here, we did that. And as far as possible I wanted to do the same thing after the war, excepting that the situation is different. I had the funds in my possession, known as Account No. 1 and Account No. 2, but I continued along those lines.

Q. In the Philippines the employees are paid by pesos, are they?

A. Yes; our funds there are pesos, and here they are dollars, and to change one into the other costs banking exchange, and I tried to avoid the employees that unnecessary expense when we had time accounts here.

Q. There was mention made here of a conference at Columbus, Ohio, with the Securities and Exchange Commission there. At whose request did you go to Columbus?

A. I think it was Mr. Holzman, wasn't it? Somebody asked me.

Q. Who is he?

A. The attorney for Allen & Company.

[fol. 226] Q. Were they stockholders of Benguet?

A. Oh, yes, stockholders. They bought what I called the Haussermann Trust stocks during the war.

Q. Does the Benguet Consolidated Mining Company have anything whatsoever to do with that attempt to register?

A. The Benguet hasn't had a share unissued since 1914. All the shares of Benguet since 1914 have been in the hands

of private individuals or entities. We had no issue except the stock dividends which we disbursed to the shareholders.

Q. The registration with the Securities and Exchange Commission in Philadelphia, was that on behalf of Benguet?

A. No, Allen & Company. Shareholders requested it to be done, and I think it shows on the face of their prospectus. "The shares of stock offered hereby are fully owned by Allen & Company. They may however be deemed underwriters under the Securities Act. No part of the expense of the registration and sale of the shares offered hereby is being borne by the company. All such expenses are being borne by the seller. None of the proceeds from the sale of the stock offered hereby will be received by the company". We had nothing to do with that except furnish the information.

Q. Do you know who prepared this prospectus?

A. I assume somebody connected with Allen & Company. I don't know whether Mr. Holzman prepared it. It was not by me. It may contain information that I furnished. —You mean the final preparation of it, writing it up?—Did you do it?

Q. I am asking you.

A. Either Mr. Mercier, Mr. Holzman or somebody. I didn't do it.

Q. Did you do anything in connection with furnishing the information contained in it?

A. Oh, yes.

[fol. 227] Q. And did I?

A. Yes, you did.

Q. Who paid my fees for it?

A. Allen & Company.

Q. Did Benguet pay me anything for doing it?

A. Oh, no, not for that.

Q. Does the Benguet Consolidated Mining Company own any stock in the New Richmond National Bank?

A. No.

Q. Does the Balatoc Mining Company own any stock in the New Richmond National Bank?

A. No.

Q. Now, I will ask you this broad question: Since you

have been here—by the way, how did you happen to come here in 1941? Were you sent by the company?

A. No. It was my vacation time, and I started and came home expecting to be here but a short time, plus the fact I think I explained that none of us thought of a war between Japan and the United States, but the European war was going on, and long prior to 1941 we had built up a supply which we thought would run the mining companies for a period of two years. We felt that the shipping would become restricted——.

Q. My question simply was, did you come on company affairs or a vacation?

A. No, I came first on a vacation. Now I want to be perfectly frank about it—plus the fact that we were not getting machinery as fast as I thought we ought to, and I took advantage of my coming to expedite if possible, the orders that had been placed by Manila.

Mr. Mercier: Could I have the privilege of refreshing his memory, if the court please? He is talking about another trip.

The Court: There is nothing before the court at this time.

[fol. 228] By Mr. Mercier:

Q. Was that the 1941 trip or a trip prior thereto?
A. Sir?
Q. When did you come here in 1941?
A. In May of 1941.
Q. And when were you scheduled to go back?
A. September, 1941.
Q. Did you come here on a vacation at that time, or——

Mr. Scherer: I object. They have gone into it, and didn't like the answer. The answer was that he came here in 1941 to expedite the shipping of machinery, and then Mr. Mercier makes a statement in open court that he is mistaken about that, and he again asks whether he came on a vacation at that time.

The Court: We have gone pretty far afield, and a good many questions have been asked that could have been objected to. He may answer the question. If there is a mis-

take about it it can be corrected. Read the answer he made.

(Read by the reporter.)

A. "No, I came first on a vacation. Now I want to be perfectly frank about it—plus the fact that we were not getting machinery as fast as I thought we ought to, and I took advantage of my coming to expedite if possible, the orders, that had been placed by Manila."

The Court: You may now put any question you want.

By Mr. Mercier:

Q. Were there some family difficulties in 1941 which necessitated you to come here? You came here in May of 1941, did you not?

A. Yes.

Q. And you were supposed to sail back in September?

A. Yes.

[fol. 229] Q. When you made trips to the United States before, were they longer or shorter trips than that one?

A. Oh, that depends. Usually we counted about six months of vacation—sometimes it ran over and sometimes it was shorter. I want to be frank. You know the war was on in Europe. July 4, 1946, was approaching. The business men in Manila were more or less concerned about the legislation that would be pending before 1946 while the war was going on, and inasmuch as I had lived there as long as I had, grown up with the company so to speak, they always asked me to come over here to Washington and watch what is being done, that nothing is done detrimental to the American business interests in the Philippines. So far as my company was concerned, I had to put it on the basis of vacation, but I was more or less interested in what would happen after July 4, 1946, and the business men there, and my friends and everything like that, they asked me to come over here and watch things; and I employed Mr. Mercier, who was a pretty live wire in Washington, to help keep me posted; and we did a great deal of business with the committee there, protecting the interests in the—both the interests of the Philippines and the business interests of the Philippines. That is the situation. I had cables from the chamber of commerce, the American chamber of commerce,

and this and that and the other, to see what you can do. I have been the unofficial ambassador of the business interests.

Q. In 1941 there was no legislation pending, was there?

A. I don't remember whether there was any legislation or not.

[fol. 230] Q. Was there in 1941 any family affair that had to be straightened out?

A. Oh, yes, family affairs; a lot of things in family affairs.

Mr. Scherer: I object.

The Court: What do you claim is the relevancy of that to the question the court has before it?

Judge White: There was a divorce suit pending between Francis Haussermann and his wife, and that is the reason he came.

The Court: I don't think, Judge White, and you other gentlemen, that why Mr. Haussermann came here has any relevancy to this matter at all.

Mr. Mercier: One of the points we will make in argument is that the judge came here temporarily in 1941, to stay about three months, to settle some family affairs. The Army took over the boats and he could not get back.

The Court: That is all in evidence—not about the family affairs, but he distinctly testified, and it is in the transcript, that he came here for a vacation and that when he was going to return to the Philippines they would not let him go back and he has been here ever since. He set a date he thought he would be able to go back this year. That is all in evidence, and I see no reason for dragging in any family affairs that may have had something to do with his coming, because I can't see the relevancy. It could not have had anything to do with his staying, because he could not go back.

By Mr. Mercier:

Q. I am going to ask you just one more question, a broad one. Since the Philippines have been reoccupied by the Americans, have you, on behalf of the Benguet Consolidated Mining Company, or any of the other companies of which [fol. 231] you are the president in the Philippines, signed any contract?

A. No.

Q. That you have negotiated?
A. No.
Q. Have you ever negotiated any contracts?
A. No.

Mr. Scherer: That is a conclusion, of course.

Mr. Mercier: What I mean, did he ever negotiate any contract. I will reframe it.

Q. Have you ever negotiated any contract for the Benguet Consolidated Mining Company or any of the other companies?

A. No; I have said time and again that I did not.

Mr. Mercier: I think that is all.

Recross-examination.

By Mr. Scherer:

Q. In this correspondence, Judge, there are accounts of telephone conversations which you had with various people in the Philippines. Are the accounts of these conversations correct that you carry in your files?

A. As near as we could reproduce them. I didn't talk to many people; I talked to Peterson and Albert. I think once Mr. DeWitt called me up.

Q. Well, the account of that conversation was dictated to your stenographer at the time, for the purpose of a record?

A. Yes.—Not dictated. I told her what it was. I wanted to keep a record of what transpired and to remember it, and made a note of it.

Q. I asked you about an office in the First National Bank Building when you were on the stand a few weeks ago. Did you ever have an office at 1505 First National Bank Building, Cincinnati, Ohio?

A. Why, no, I never had any office——

[fol. 232] The Court: What is the purpose of going into that again? He testified to that definitely, and I remember you asked this question: Isn't it a fact your name was in the telephone book? And he answered, "If it was I don't know how it got there".

A. That's right.

The Court: Unless you have some further purpose? If there is something else about it I will let you ask the question, but I don't want the whole thing gone over, and over, and over. If there is something else I will permit it.

Mr. Scherer: I had some additional information to refresh his memory, if the court please.

Q. Judge Stanley Roettinger has an office in the building, has he not?

A. Yes.

Q. Did you have an office with him at any time?

A. No.

Q. He is related to you I believe?

A. I have called on him many times, but had no office there.

Q. Any listing you have with an office there is unknown to you?

A. It is absolutely a surprise; never heard of it. I never had an office there. As I told you, the bank officials were courteous to me, and offered that if I wanted to come and see anybody that I could make use of one of its offices.

Q. That was in the bank? I just wanted to refresh your recollection.

A. I never had an office in this city that I know of; never authorized anybody to list it, excepting the Cincinnati Directory my home is listed, and my office, in order that people that come here can look in the Cincinnati telephone and locate me.

[fol. 233] Q. You didn't know that the secretary of Judge Roettinger took telephone calls or anything for you?

A. Why, no, I don't know it. While I was in the Philippine Islands Mr. Roettinger was employed by me to look after some building construction; that is the only business relation I had with him; but I knew his father, and would come down and go up in his office quite frequently.

Mr. Scherer: That is all.

The Court: I want to ask you, Judge, one question myself. In the ordinary course of the business when it was conducted normally, did you sign the checks for Benguet as president?

A. In the Philippine Islands? Oh, yes. I was not the only one authorized to sign them.

The Court: But you were authorized?

A. Oh, yes.

The Court: And if you were there you signed them, and if not, somebody else signed?

A. Yes, certainly.

(And thereupon witness left the stand.)

Mr. Mercier: At this point, if the court please, I would like to renew, for the purpose of having suitable objection in the record, and an exception to the ruling, the offer to prove that while those minutes recited a meeting of the board of directors as having been held at New Richmond, the only person at that place was Judge Haussermann; the others were contacted by telephone for the purpose of that particular meeting, and those particular records.

The Court: I don't know what your statement will amount to in the record. I said, when I sustained Mr. [fol. 234] Scherer's objection, that if you wanted to make a profert you could make it into the record of what you proposed to prove if the court had permitted the answer. I am not trying to take advantage of anyone, and will still permit you to make that profert at this time, but your statement would not amount to anything if the matter is reviewed.

Mr. Mercier: I will state, then, that if permitted to answer the question to which objection was made, the witness would have answered that but one meeting was actually held at Pond Run farm, New Richmond, Ohio; that the minutes for the other meetings were prepared in Washington by myself, in advance of the meeting, were then sent to the judge and he telephoned to the others, and read them to see if they approved, and that thereafter the minutes were sent to the others to be signed.

The Court: That may be accepted as having been made at the time the witness was being examined. Having permitted the plaintiff to reopen your case for this further cross examination, I will ask you whether or not you gentlemen desire at this time to offer anything further.

Mr. Long: We had an agreement that we were to furnish certified copy of excerpts from the Philippine Business Law by Perkins, and we went to the trouble of getting it prepared, and we want it in the record. We understood—they had a copy of this book, and when they finished with it it was to be turned over to us, and it was sent back to the

library of Congress. We had a certified copy of such portions of that book as we wish to offer in evidence, and here [fol. 235] it is. If they are not going to offer it, we make a motion to reopen so as to offer it.

The Court: It may be admitted as part of the defendant's case in support of the motion, as Exhibit 8.

(Note: By inadvertence the No. 7 was omitted in numbering the exhibits, thus skipping from Exhibit 6 to Exhibit 8.)

Said certified copy of excerpts from the Philippine Business Law having been admitted in evidence by the court, was marked Exhibit 8, is hereto attached and made part hereof.

Mr. Long: We have nothing further at this time, if the court please.

And thereupon the plaintiff, in resisting said motion to quash service of summons, offered the following evidence, to wit:

Mr. Scherer: We offer, if the court please, the Notes to the Spanish Civil Code by Charles A. Willard, associate justice of the Supreme Court of the Philippines.

The Court: That may be admitted as Exhibit 9.

Said Notes to the Spanish Civil Code by Willard having been admitted in evidence by the court was marked Exhibit 9, is hereto attached and made a part hereof.

Mr. Scherer: And as the next exhibit we offer the Civil Code of Spain by Notes,—with Philippine notes, by Fisher, 4th edition.

The Court: That may be admitted as Exhibit 10.

Said Civil Code of Spain with Philippine Notes, Fisher 4th edition, having been admitted in evidence by the court, was marked Exhibit 10, is hereto attached and made part hereof.

[fol. 236] Mr. Scherer: The Code of Commerce of Spain has been introduced. I don't think it is necessary to introduce it again.

The Court: That is Exhibit 2. No, it is not necessary to offer it again.

Mr. Scherer: The next exhibit we offer is the certified copy of the answer of the Benguet Consolidated Mining Company in the case of Idonah Slade Perkins versus Benguet Consolidated Mining Company, No. 278792, Superior Court of the state of California.

The Court: It will be admitted as Exhibit 11.

Said certified copy of answer of Benguet Consolidated Mining Company in Case No. 278792, Superior Court of California, Idonah Slade Perkins versus Benguet Consolidated Mining Company having been admitted in evidence by the court, was marked Exhibit 11, is hereto attached and made part hereof.

Mr. Scherer: Your Honor please, the next exhibit we offer is a duly certified copy, already identified as "A", which is the statement of registration filed by Benguet Consolidated Mining Company with the Securities and Exchange Commission of the United States, together with amendments.

The Court: It may be admitted as Exhibit 12.

Said certified copy of statement of registration of Benguet with the Securities and Exchange Commission of the United States, having been admitted in evidence by the court, was marked Exhibit 12, is hereto attached and made part hereof.

Mr. Scherer: We would like next to offer in evidence, if the court please, this file of orders, marked for identification "A 8-4-47".

[fol. 237] The Court: They may be admitted as Exhibit 13.

Said file of purchase orders having been admitted in evidence by the court "A 8-4-47" was marked Exhibit 13, is hereto attached and made part hereof.

Mr. Long: We are not objecting to the manner of the introduction, because they are offered in a batch, but we do object, and save our exception to the question as to those orders which were given after April 4. Anything given after April 4 we are objecting to, and I think your Honor will——

The Court: Objection sustained.

Mr. Long: We want to save our exception to the materiality of all of them.

The Court: Mr. Scherer said this morning that it was agreed that these should all go in evidence except those dated after this attempted service. If you are going to object to the materiality this court is certainly going to look at the orders, and go through them myself, before I make a ruling. I thought you agreed except in so far as some happened to be after April 4.

Mr. Long: When Mr. Scherer asked if we wanted him to tear this apart and have him identify each individual one, we said no. We were not waiving any right that we had to object to the materiality.

The Court: It has been testified as I understood, that they are all purchase orders of the Benguet. I want to ask and have you answer: Is there any objection to this Exhibit 13 except as to the part of it that is not within what we say is the time?

Mr. Long: That is the only objection.

Mr. Scherer: Everything is within the time. Now, if the court please, I would like to offer in evidence the batch of [fol. 238] correspondence which has been identified as "R. 8-5-47".

Mr. Mercier: We object to the materiality of it, because as explained by the witness on the stand, that correspondence deals in more than two-thirds of it, with matters of the Balatoc mine and other companies than the Benguet.

Mr. Long: I am willing to let the court go through them, and determine which in his judgment is material and which is not.

The Court: Let me ask you this question: When you introduce the rest of these documents, does it complete your side of this case?

Mr. Scherer: No. We have two witnesses from the bank, and one other witness.

The Court: According to my record, Messrs. Long and Bloom and Mr. Mercier, Mr. Ely, Mr. Speidel and Judge White all represent Mr. Haussermann and Benguet in this case?

Mr. Long: That is my understanding.

The Court: I wish you gentlemen would all listen very carefully so that we will either all agree on this thing or not agree. It is agreed by counsel for the plaintiff and

counsel for the defendant Benguet Consolidated Mining Company, that Exhibit 14, and subsequent exhibits offered by the plaintiff, shall be received by the court in the form in which they were identified by counsel for the plaintiff. That in consideration of the cause the court shall determine what parts of those exhibits are in the opinion of the court competent, relevant and material to the issues raised, and [fol. 239] what parts of the exhibits are not competent, relevant or material to the issues raised. Counsel for plaintiff will be given an exception to any part of the exhibit excluded by the court which in their judgment is competent, relevant and material, and counsel for the defendant will be given an exception to any part of the exhibit considered by the court which they consider to be incompetent, irrelevant and immaterial to the issues. Is that agreeable?

Mr. Long: That is agreeable.

Mr. Mercier: That is agreeable.

Mr. Scherer: That is agreeable.

And thereupon court recessed for luncheon until 2 o'clock.

Afternoon Session, Tuesday, August 5, 1947, 2 o'Clock

Mr. Scherer: Plaintiff now offers, if the court please, the correspondence about which we talked before noon, heretofore identified as "B 8-5-47".

The Court: It may be admitted as Exhibit 14.

Said correspondence file identified as "B 8-5-47", having been admitted in evidence by the court, was marked Exhibit 14, is hereto attached and made part hereof.

Mr. Scherer: Plaintiff next offers in evidence correspondence file marked for identification "K 8-5-47", and marked on the tab "Licenses expenditure of funds for Balatoc and Benguet".

The Court: It may be admitted as Exhibit 15.

Said file having been identified heretofore as "K 8-5-47", and marked "Licenses, etc., Balatoc and Benguet", having been admitted in evidence by the court, was marked Exhibit 15, is hereto attached and made part hereof.

[fol. 240] Mr. Scherer: Plaintiff next offers in evidence Identification A, being a file comprising the minutes of the

board of directors' meetings of Benguet Consolidated Mining Company.

The Court: It may be admitted as Exhibit 16.

Said file containing the minutes of the meetings of the board of directors of Benguet Consolidated Mining Company having been admitted in evidence by the court, was marked Exhibit 16, is hereto attached and made part hereof.

Mr. Scherer: Next I offer a file of correspondence identified as "C 8-5-47" and entitled "Peterson".

The Court: It may be admitted as Exhibit 17.

Said file identified as "C 8-5-47" and marked "Peterson" having been admitted in evidence by the court, was marked Exhibit 17, is hereto attached and made part hereof.

Mr. Scherer: Plaintiff next offers file of correspondence identified as "D 8-5-47" and designated "Peterson's letters".

The Court: It may be admitted as Exhibit 18.

Said file identified as "D 8-5-47" and marked "Peterson's letters" having been admitted in evidence by the court, was marked Exhibit 18, is hereto attached and made part hereof.

Mr. Scherer: Plaintiff next offers file identified as "E 8-5-47" containing correspondence designated "Peterson's letters 112-130".

The Court: It may be admitted as Exhibit 19.

Said file identified as "E 8-5-47" and marked "Peterson's letters 112-130" having been admitted in evidence [fol. 241] by the court, was marked Exhibit 19, is hereto attached and made part hereof.

Mr. Scherer: Plaintiff offers in evidence next, if the court please, a file marked for identification "F 8-5-47", containing correspondence, and designated on the file "Peterson's letters 131-140".

The Court: It may be admitted as Exhibit 20.

Said file identified as "F 8-5-47" and marked "Peterson's letters 131-140" having been admitted in evidence by the court, was marked Exhibit 20, is hereto attached and made part hereof.

Mr. Scherer: Plaintiff offers in evidence, if the court please, file identified as "G 8-5-47" containing correspondence designated "Joseph S. Peterson".

The Court: It may be admitted.

Said file identified as "G 8-5-47" and marked "Joseph S. Peterson", having been admitted in evidence by the court, was marked Exhibit 21, is hereto attached and made part hereof.

Mr. Scherer: Next the plaintiff offers in evidence, if the court please, what has been identified as "I 8-5-47"——

Mr. Mercier: I think those are after April 4.

Mr. Scherer: No, this is the file containing the correspondence designated "Ohio Securities Commission".

The Court: It may be admitted as Exhibit 22.

Said file identified as "I 8-5-47" and designated as "Ohio Securities Commission" having been admitted in evidence by the court, was marked Exhibit 22, is hereto attached and made part hereof.

Mr. Scherer: I next offer what has been marked for identification "J 8-5-47"——

[fol. 242] Mr. Mercier: That is the one, which I think is after the fourth of April, 1947.

Mr. Scherer: It is the annual report as of December 31, 1946.

Mr. Mercier: We will withdraw the objection.

The Court: It may be admitted as Exhibit 23.

Said annual report heretofore marked for identification "P 8-5-47" having been admitted in evidence by the court, was marked Exhibit 23, is hereto attached and made part hereof.

Mr. Scherer: Plaintiff offers in evidence identification "L 8-5-47" which is a check book containing stubs.

The Court: It will be admitted as Exhibit 24.

Said check book containing stubs, heretofore marked for identification "L 8-5-47", having been admitted in evidence by the court, was marked Exhibit 24, is hereto attached and made part hereof.

Mr. Scherer: I now offer identification "M 8-5-47", which is a check book in which there are still a few checks.

The Court: It may be admitted as Exhibit 25.

Said check book containing blank checks, heretofore marked for identification "M 8-5-47", having been admitted in evidence by the court, was marked Exhibit 25, is hereto attached and made part hereof.

Mr. Scherer: I next offer what has been marked for identification "N 8-5-47", which is correspondence and the file is designated "Rose McKee".

The Court: It may be admitted as Exhibit 26.

Said file of correspondence marked "Rose McKee", heretofore identified as "N 8-5-47" having been admitted [fol. 243] in evidence by the court, was marked Exhibit 26, is hereto attached and made part hereof.

And thereupon the plaintiff, in further resisting the motion of the defendant, called as a witness, J. L. MEEKER, who, being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Scherer:

Q. Will you state your name, please?
A. J. L. Meeker.
Q. And what is your occupation?
A. Cashier of the New Richmond National Bank.
Q. Where do you live, Mr. Meeker?
A. New Richmond, Ohio.
Q. And you are the cashier of the New Richmond Bank?
A. Yes, sir.
Q. How long have you been cashier of the New Richmond National Bank?
A. Approximately seven years.
Q. Is John W. Haussermann still president of the New Richmond National Bank?
A. Yes, sir.
Q. Mr. Meeker, what accounts does Benguet Consolidated Mining Company have with the New Richmond National Bank?
A. None at all, today.

Q. Did it ever have accounts there?

A. Yes, sir.

Q. How were those accounts carried?

A. Carried in the name of John W. Haussermann President No. 1, and No. 2.

Q. And when were those accounts opened? You may refer to your records.

A. John W. Haussermann President Account No. 1 was originated in April, 1942, and it was closed in April of 1943.

Q. Then was it reopened?

A. Yes, it was reopened in February of 1946.

[fol. 244] Q. And when was it finally closed?

A. April, 1947.

Q. What date?

A. April 30.

Q. Was it an active account on April 4, 1947?

A. Yes, sir.

Q. Do you have the original ledger sheets of that account?

A. Yes, sir.

Mr. Scherer: I would like to offer them in evidence, if the court please.

The Court: They may be admitted as Exhibit 27.

Said ledger sheets, John W. Haussermann President Account No. 1, having been admitted in evidence by the court, were marked Exhibit 27, and permission having been given to substitute photostatic copies in lieu of originals, said copies were hereto attached and made part hereof.

By Mr. Scherer:

Q. Also Benguet had an account in the name of John W. Haussermann President No. 2?

A. As I understand, that is a Balatoc account.

Q. Mr. Meeker, just to refresh your recollection, Mr. Haussermann says you are mistaken about that.

A. Probably I am, because I did not have the names of the mining companies. They were evidently Benguet accounts.

Q. President No. 2 is a Benguet account; no question about that?

A. No, sir.

Q. Do you have the ledger account of—ledger sheet of John W. Haussermann President No. 2?

A. Yes, sir.

Q. That is a Benguet account?

A. Yes, sir.

Q. When was that opened?

A. April 1, 1942.

Q. And when was it closed?

A. April 15, 1943.

Q. Was it again opened?

A. No, sir.

[fol. 245] Q. Refreshing your recollection, Mr. Meeker, in the deposition taken a month ago, didn't you testify that both these accounts were closed on April 30, 1947, John W. Haussermann Account No. 1——

A. I can't recall, sir, what evidence I gave with reference to No. 2.

Mr. Scherer: Plaintiff would like to offer this ledger sheet in evidence, Account No. 2.

The Court: It may be admitted as Exhibit 28.

Said ledger sheet of John W. Haussermann President No. 2, having been admitted in evidence by the court, and permission given to substitute photostatic copy, same was marked Exhibit 28, copy is hereto attached and made part hereof.

Q. Do you have the signature cards for those accounts?

A. No, sir.

Q. Are there any signature cards in the bank for those accounts?

A. There are.

Q. Did you bring them with you?

A. Today?

Q. Yes.

A. No, sir.

Q. Well, didn't you have the signature cards here at the time the depositions were taken?

A. No, sir.

Q. Well, do you know whose signature was required to make withdrawals on that account?

A. Yes, sir.

Q. Whose?

A. Mr. Haussermann's.

Q. Could anybody else make withdrawals from that account?

A. No, sir.

Q. Now, who made the deposits, to your own knowledge, in these accounts?

A. Mr. Haussermann's secretary.

Q. Miss Gordon?

A. That is right.

Q. Now, Miss Gordon is not an employee of the bank, is she?

A. No, sir.

[fol. 246] Q. Who is she employed by?

A. Mr. Haussermann.

Q. And what office does she work in in the bank building?

A. In Mr. Haussermann's office.

Q. Where is that located?

A. On the second floor of the bank building.

Q. That is not an office of the bank, is it?

A. No, sir.

Q. And to your knowledge there are no other accounts in the bank of Benguet Consolidated?

A. There are none.

Q. None other than these two?

A. That is right.

Q. Do you have a resolution of record in the bank from the Benguet Consolidated Mining Company, authorizing the establishment of these accounts and the withdrawal of any funds by certain individuals?

A. No, sir.

Q. Is that a rule of the bank, that all companies——

A. No, it is not.

Q. Are you an executive officer of the bank, Mr. Meeker?

A. Yes, sir.

Q. Doesn't the bank require all corporations to have on file a resolution——

Mr. Long: If he has finished we have an objection to the form.

The Court: What do you claim for that, Mr. Scherer?

Mr. Scherer: Well, our contention of course is that this is not a corporation—at least by inference they did not require a resolution of this company.

The Court: How could the rules of the bank, or what the bank required do anything to establish whether this is or is not a corporation in law? The bank has a right to make rules, but they don't establish anything as a matter of law. Objection sustained.

[fol. 247] By Mr. Scherer:

Q. Did Judge Haussermann have an office in——

Q. Did Judge Hausserman have an office in the bank—I mean downstairs in the bank?

A. No, sir.

Q. Do you remember when—how long Judge Haussermann has been back from the Philippines?

A. I can't remember the exact date, but I know that he came back shortly before Pearl Harbor.

Q. And he has been here ever since?

A. Yes, sir.

Q. Now, about how often would you see him during that time, say in a week?

A. Sometimes I wouldn't see him at all in a week.

Q. Well, when he was back home in New Richmond how often did you see him in the bank?

A. Well, he would be in every day and I would see him, when he was in New Richmond.

Q. Do you have with you a letter dated April 30, 1947, from Mr. Haussermann addressed to you?

Mr. Mercier: May I say that that letter was not returned to the bank after the depositions were taken.

Mr. Scherer: I have a copy of it. Evidently the defendant will object, because it is dated April 30, 1947, but I want to offer it in evidence because I asked Judge Haussermann on the stand with reference to certain payments to these various individuals, the wives of the men who were working in the Philippines, and he admitted that those payments had been made regularly for at least a year to a year and a half prior to April 4.

The Court: There is nothing before the court, Mr. Scherer.

Mr. Long: Are you reading from it?

Mr. Scherer: Yes, a copy. I haven't the letter.

[fol. 248] Mr. Long: We object to it.

The Court: For any transactions prior to April 4 it is competent, but not for anything after.

Mr. Scherer: I can only offer as to those Judge Haussermann admitted, although he did not say explicitly; I remember, that he said in reference to several of them, that, I asked as to several other than wives of officers in the Philippines, the orders had been pending. I think it is only competent in so far as the seven or eight women, wives of employees in the Philippines, which he admitted the obligation had accrued for a year or a year and a half.

The Court: I will overrule the objection and admit it on the same basis as the other correspondence. If, when I come to consider the case, I conclude it is competent I will consider it, and if not I will not consider it.

Mr. Long: Note our exception.

The Court: It will be admitted as Exhibit 29.

Said letter dated April 30, 1947, John W. Haussermann to J. L. Meeker (copy) having been admitted in evidence by the court, was marked Exhibit 29, is hereto attached and made part hereof.

Mr. Scherer: That is all I have to ask Mr. Meeker.

Mr. Mercier: No questions.

(And thereupon witness left the stand.)

[fol. 249] And thereupon the plaintiff, in further resisting the motion, called as a witness, W. S. Gunckel, who, being first duly sworn, testified as follows, to wit:

Direct Examination.

By Mr. Scherer:

Q. Will you state your name?

A. W. S. Gunckel.

Q. Where do you live, Mr. Gunckel, please?

A. 875 Ludlow avenue, Cincinnati, Ohio.

Q. Employed by whom, Mr. Gunckel?

A. The First National Bank of Cincinnati.

Q. In what capacity?

A. Comptroller.

Q. How long have you been so employed?

A. I think since about 1936 or '7.

Q. And does the Benguet Consolidated Mining Company have any accounts with your bank?

A. No, sir.

Q. Did it have accounts with your bank?

A. No, sir.

Q. At no time?

A. No, sir.

Q. Did you have an account designated John W. Haussermann President No. 1?

A. Yes, sir.

Q. Do you have the ledger sheet of that account with you?

A. Yes, sir.

Q. These are the ledger sheets of John W. Haussermann President Account No. 1?

A. Yes, sir.

Q. What does this mean, over to the left of his name, "Benguet Consolidated Mining Company"?

A. That was information put on there by someone, I don't know who. This is the name of the account.

Q. Well, it isn't written on there; it is typed the same as the name?

A. This is the designation of the account over here, "John W. Haussermann No. 1".

[fol. 250] Q. When was this account opened?

A. January 2, 1942.

Q. And when was it closed?

A. April 30, 1947.

Q. Was it an active account on April 4, 1947?

A. Yes, sir.

Mr. Scherer: I would like to offer the ledger sheet in evidence, if the court please, and ask permission as in the other case, to substitute photostatic copies.

The Court: It will be admitted as Exhibit 30, and copies may be substituted.

Said ledger sheet of John W. Haussermann President No. 1, in the First National Bank of Cincinnati having been admitted in evidence by the court, was marked Exhibit 30, and photostatic copy is hereto attached and made part hereof.

By Mr. Scherer:

Q. Do you have the signature card for that account?
A. Yes, sir.
Q. And whose signature was required to make withdrawals from that account?
A. John W. Haussermann, President No. 1.
Q. And would any other signature be honored in making withdrawals from that account?
A. No, sir.
Q. Is this the card?
A. Yes, sir.

Mr. Scherer: I offer the signature card in evidence, if the court please, and ask permission to substitute a photostatic copy in place of the original.

The Court: That may be done. It will be Exhibit 31.

Said signature card, John W. Haussermann President Account No. 1, First National Bank, Cincinnati, having been admitted in evidence with leave to substitute photostatic copy, was marked Exhibit 31, copy attached hereto and made part hereof.

[fol. 251] By Mr. Scherer:

Q. Do you have an account in the name of John W. Haussermann, President No. 2?
A. Do we have now?
Q. Yes.
A. No, sir.
Q. Did you ever have such?
A. Yes, sir.
Q. When did you have such an account?
A. The account was opened January 2, 1942.
Q. And when was it closed?
A. April 30, 1947.
Q. Was it an active account on April 4, 1947?

A. Yes, sir.

Q. And this is the only ledger sheet you have for that account?

A. Yes, sir.

Mr. Scherer: I offer it in evidence, if the court please, and ask leave to substitute photostatic copy.

The Court: That may be done. Exhibit 32.

Said ledger sheet, John W. Haussermann President No. 2, having been admitted in evidence by the court, with leave to substitute copy, was marked Exhibit 32, copy is hereto attached and made part hereof.

By Mr. Scherer:

Q. Do you have a signature card for that account?

A. Yes, sir.

Q. This is it?

A. President No. 2.

Q. And whose signature was required to make withdrawals on that account?

A. John W. Haussermann President No. 2.

Q. Could any other person make withdrawals on that account?

A. No, sir.

Mr. Scherer: I offer the card in evidence, if the court please, and ask leave to substitute photostatic copy.

The Court: That may be done. Exhibit 33.

Said Signature card, John W. Haussermann President No. 2, having been admitted in evidence with leave to sub-
[fol. 252] stitute a copy, was marked Exhibit 33, is hereto attached and made part hereof.

By Mr. Scherer:

Q. Do you have any cancelled checks that were drawn on either of these two accounts in the possession of the bank?

A. No, sir.

Mr. Scherer: I have nothing further to ask the witness.

Mr. Long: We haven't any questions.

(And thereupon witness left the stand.)

And thereupon the plaintiff, in further resisting said motion, called as a witness, WILLIAM COUGHLEN, who, being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Scherer:

Q. Will you state your name, please?
A. William Coughlen.
Q. Mr. Coughlen, where do you live?
A. Norwood, Ohio.
Q. Employed by the First National Bank of Cincinnati, Ohio?
A. I am.
Q. In what capacity?
A. I am the trust officer.
Q. Is Mr. Edgar C. Wollwender on his vacation?
A. He is.
Q. Is the First National Bank of Cincinnati transfer agent for the Benguet Consolidated Mining Company?
A. It is a co-transfer agent.
Q. What do you mean by a co-transfer agent?
A. The company maintains a transfer agency at its office in Manila, which also transfers certificates for the company.
[fol. 253] Q. You are the only transfer agent for the company in the United States, are you?
A. I think so.
Q. Did you bring with you the resolution of the Benguet Consolidated Mining Company designating the First National Bank as transfer agent for its stock in the United States?
A. I have here a copy of the minutes of the special meeting of the board of directors.

The Court: May I inquire as to the relevancy of that?
Mr. Scherer: We feel that it is another indication of this company doing business in the state of Ohio.
The Court: Even assuming that to be correct, he has testified to the effect that the bank of which he is an officer, is the transfer agent. I can't see, when the gentleman says that the bank is a co-transfer agent of this company, why you have to go any further in this hearing than that.

Mr. Scherer: Very well, your Honor. That is all.
Mr. Long: We have no questions.

(And thereupon the witness left the stand.)

And thereupon the plaintiff, further resisting said motion, called as a witness, GAYLE B. PARSONS (MRS.), who, being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Scherer:

Q. Will you state your name?
A. Mrs. Gayle B. Parsons.
Q. And where do you live, Mrs. Parsons?
A. In the Lane Seminary grounds, the Beecher Apartments.
Q. And what is your business or profession?
A. I am a teacher in the Cincinnati public schools.
[fol. 254] Q. Mrs. Parsons, I believe you know Idonah Slade Perkins, the plaintiff in this action?
A. Yes, I do.
Q. How long have you known Mrs. Perkins?
A. I have known her since 1929.
Q. Did you know her in the Philippines when you were both there?
A. Yes, I did. I was teaching in the government schools in the Philippine Islands.
Q. And you have been personal friends ever since that time?
A. Yes, we have.
Q. Now, Mrs. Parsons, directing your attention to the month of July, 1945, I will ask whether or not you had occasion to go to New Richmond, Ohio, with Mrs. Perkins?
A. Mrs. Perkins asked me to go with her out to New Richmond.
Q. In whose automobile did you drive?
A. I drove my own; I drove her up there.
Q. When you got to New Richmond, just tell the judge where you went.

A. We went to the bank, facing the river, and we went inside, and Mrs. Perkins asked whether—there was a gentleman there and she asked whether or not that was the Benguet bank, and he said yes, that it was. She said——

Mr. Long: We object to what somebody told her.
The Court: Objection sustained.

By Mr. Scherer:

Q. Now, you can't tell what conversation you had downstairs, but were you shown anything, you and Mrs. Perkins, after the conversation was had?

A. We were shown the pictures on the wall of the bank, the murals.

Q. And I understand the purpose of your visit was to see——

Mr. Long: Objection to leading his own witness.
[fol. 255] The Court: There have been lots of leading questions asked.

By Mr. Scherer:

Q. What happened after you had your conversation on the first floor of the bank and were shown these pictures on the wall?

A. Mrs. Perkins asked——

Q. By the way, what were those pictures?

A. Pictures of the Philippines.

Q. And then after that what did you do?

A. Mrs. Perkins asked where to find Mr. Haussermann, and she was told that he was on——

Mr. Long: Objection.

By Mr. Scherer:

Q. Where did you go?

A. We went upstairs, and to an office on the second floor with a window overlooking the river.

Q. Was there more than one office?

A. There were two offices.

Q. Who was present in the office?

A. Mr. Haussermann was there, and his secretary was there.

Q. His secretary—was that Miss Gordon, do you know?

A. Yes, it was. I think I see her here.

Q. And had you known Judge Haussermann before that time?

A. I had seen him in the Philippines and had known who he was, but had never been introduced to him, although I had met his son Francis and his son's wife.

Q. Will you describe this office that Judge Haussermann was in, and the adjacent room, the office and its equipment?

A. I remember Mr. Haussermann's desk, and I remember a number of file cases and many papers.

Q. Where were these file cases?

A. Mr. Haussermann asked his secretary to bring in, as [fol. 256] I remember, the file from the Philippines, and she brought that in from the other room.

Q. Was a discussion had after that file was brought in, between Judge Haussermann and Mrs. Perkins?

A. Yes, there was.

Q. And was the file used in that discussion?

A. Yes, it was.

Q. And then were there any other files in evidence?

A. Yes, Mr. Haussermann turned in his chair to the back where there were other file cases, and got out a file from San Francisco.

Q. Was there a discussion?

A. Yes, and a letter, which he got out and showed to her, and she showed it to me.

Q. How long did Judge Haussermann and Mrs. Perkins talk there in his office?

A. We were there probably an hour.

Q. After they had discussed the business at hand, do you remember what the discussion was about?

A. It was about her affairs, that I know.

Q. Was anything said before you left about going to Pond Run farm, or anything like that?

A. Mrs. Perkins said she would like to go and see it.

Q. See what?

A. Mr. Haussermann's farm at Pond Run; and he said he was too busy, that he had all the rehabilitation of the

mines to take care of, and that he couldn't spare the time; that he and his secretary had an appointment at the First National Bank and that he was late for that now.

Q. Did he say anything further as to the responsibility that he had because of——

A. He said that he had hoped to retire, but that all of the [fol. 257] load of the rehabilitation was on his shoulders; that he had depended on Francis and that Francis wasn't doing anything, and he had to do it all.

Mr. Scherer: That is all.

Cross-examination.

By Mr. Mercier:

Q. Mrs. Parsons, would you tell us how the room of the judge that you went into, looked?

A. The desk had the chair so that the back of the chair was towards the river—the window was back this way. The chair was here, and the desk part out in front. There were file cases behind.

Q. Behind what?

A. If he were sitting in the chair the window was here, and the file cases here, and the judge would swing around to get them.

Q. He had file cases on his right and left, and in back of him?

A. They were behind him, and there wasn't so much space between the window and the wall.

Q. How many file cases were there?

A. I am sorry, but I couldn't tell you how many.

Q. Was there any?

A. I think there were a number.

Q. Were there five?

A. Probably more than that.

Q. Ten?

A. I couldn't tell you.

Q. Five or six?

A. I did not count them at all; it was more of an impression.

Q. It was more than five?

A. I would say so.

Q. Less than ten?
A. I am unable to state.
Q. Was it more than ten?
A. I am sorry, but I cannot tell you how many. I did not count them, and just know that there were a number of them.
Q. You are as certain about the file cases as about the conversation you had, are you?

[fol. 258] Mr. Scherer: Objection.
The Court: What is the objection?
Mr. Scherer: Argumentative.
The Court: She may answer.

A. I am certain that Mr. Haussermann turned around in his chair and got these papers from behind him.
Q. From a filing cabinet?
A. Yes.

Mr. Mercier: That is all.

Redirect examination.

By Mr. Scherer:

Q. Could you see into the second room?
A. Yes, and when we left the room we went out that way, through—out through that door.
Q. Were there any file cabinets there?
A. Yes, there were.
Q. Where did Miss Gordon get the Manila file from?
A. From the other room.

Mr. Scherer: That is all.

(And thereupon witness left the stand.)

Mr. Scherer: That is our case, except before argument I would like to read to your Honor some of the letters that have been introduced in evidence.
The Court: Is there anything further from the defendant?
Mr. Mercier: We would like to call one witness, if the court please.

[fol. 259] And thereupon, in further support of its motion, the defendant called JEAN MARIE GORDON, who, being first duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Mercier:

Q. Your name is what, please?
A. Jean Marie Gordon.
Q. Where do you live, Miss Gordon?
A. New Richmond, Ohio.
Q. How long have you worked for Judge Haussermann?
A. Since October of 1942.
Q. In 1945 do you recall a visit at the office, of Mrs. Perkins and Mrs. Parsons?
A. Yes, I do.
Q. Could you tell us, in the time you have been working for Judge Haussermann, has there been any file case in the room where he sits?
A. Never.
Q. Could you tell us, in 1945, when Mrs. Perkins and Mrs. Parsons came to the office, how many file cases there were in the two rooms, the one where you were and the one where he sits?
A. Two in the room I sit in, is all.

Mr. Mercier: That is all.

Cross-examination.

By Mr. Scherer:

Q. There are two rooms there?
A. There is one door leading into our offices, and you have to go through that door to get in, and through my room to get to his.
Q. You have an office outside of Mr. Haussermann's?
A. Yes, sir.
Q. And you have a typewriter? A. Yes, sir.
Q. And an adding machine?
A. Yes, sir.
[fol. 260] Q. What other office equipment have you there?
A. Two file cases, and that is all that is in there.

Q. And these records here that have been introduced in evidence, have been taken from those files?

A. They were contained in those file cases.

Q. Do you live in New Richmond?

A. Yes, I do.

Q. You have never been to the Philippines?

A. No, I have not.

Q. When did you cease to be assistant secretary of Benguet?

A. May 15, 1947.

Q. And you have been on the Benguet payroll since you began to work for Benguet?

A. No, sir. Mr. Haussermann paid me except for the time I served as assistant secretary.

Q. Then you were paid with Benguet funds?

A. Half Benguet and half Balatoc.

Q. That was up to May——

A. May 15, 1947.

Q. And you typed a great deal of this correspondence there?

A. Much of it.

Q. Did you type also cablegrams and telegrams to the Benguet office?

A. Yes.

Q. You put in long distance calls to Manila, did you?

A. Sometimes; not all the time.

Q. Well, you have put them in?

A. Yes.

Q. Some of this correspondence is directed to Pond Run farm, New Richmond? Does the post go to his home?

A. No, sir; one of the chauffeurs picks up the mail and brings it to the bank from the post office.

Q. That is, whether it is directed to the bank or to the farm?

A. That is right.

Mr. Mercier: I believe the cross examination is supposed to be limited to the original——

[fol. 261] The Court: No; anything that is pertinent to the issue may be asked.

By Mr. Scherer:

Q. You prepared for Mr. Haussermann's signature the checks that were drawn on John W. Haussermann President No. 1 and No. 2 on both the New Richmond and First National Banks, did you not?

A. Yes, most of them. Mr. Haussermann may have written some of them.

Q. You prepared them at his direction?

A. Yes.

Q. You made deposits downstairs in the bank in those accounts at his direction?

A. Yes, at his direction.

(And thereupon witness left the stand:)

Mr. Long: We have nothing further to offer, your Honor.

Mr. Scherer: That is all we have, your Honor please.

The Court: I understand that both sides have rested so far as the evidence goes?

Mr. Scherer: Yes, sir.

Mr. Long: That is correct.

The above and foregoing, together with the exhibits attached hereto and made part hereof, was all the evidence offered by either party on the hearing on the motion to quash service of summons.

And thereupon court adjourned, and the further hearing of this matter was continued until Wednesday morning, August 6, 1947, at 10 o'clock.

[fol. 262] IN THE COURT OF APPEALS OF CLERMONT COUNTY, OHIO

[Title omitted]

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

Case No. 181

1948, December 20. Transcript of the docket entries of the Common Pleas Court, Clermont county, Ohio, and original papers filed.

1948, December 30. Bill of exceptions filed.

1949, April 14. Motion to reduce appeal on questions of law and fact to appeal on questions of law only filed.

1949, May 6. Entry reducing appeal on questions of law and fact to appeal on questions of law only filed.

1949, May 27. Bill of exceptions refiled, Court of Appeals.

1949, June 2. Bill of exceptions transmitted back to clerk.

1949, June 2. Briefs of plaintiff-appellant filed.

1949, June 2. Receipt of brief filed.

[fol. 263] 1949, June 17. Briefs of Benguet Consolidated Mining Company, defendant-appellee, filed.

1949, June 17. Receipt for brief filed.

1949, September 8. Entry authorizing withdrawal of counsel filed.

1949, October 13. Heard and submitted to Ross, P. J.

1950, January 27. Opinion filed.

1950, February 16. Entry filed.

1950, March 6. Notice of appeal filed.

1950, May 26. Order to certify record filed.

JUDGMENT

February 16, 1950. This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings applicable to this cause, from the order of the Court of Common Pleas of Clermont county, Ohio, quashing the service of summons upon the defendant, the Benguet Consolidated Mining Company, and was argued by counsel. On consideration whereof, the court find there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant.

It is therefore considered by the court that the judgment of the Court of Common Pleas of Clermont county, Ohio, quashing the service of summons upon the defendant, the Benguet Consolidated Mining Company, be and the same is hereby affirmed, and that the appellee recover from the appellant his costs herein expended, taxed at $.

And the court, being of the opinion that there was reasonable grounds for this appeal, allows no penalty.

This cause later came on to be heard upon the applica-

tion or motion of the plaintiff-appellant for a rehearing, [fol. 264] and upon due consideration thereof the court find said application without merit and does hereby overrule said application or motion and again affirms the judgment of the Common Pleas Court of Clermont county, Ohio, in quashing the service of summons upon the defendant, the Benguet Consolidated Mining Company.

It is further ordered that a special mandate be sent to the Common Pleas Court of Clermont county, Ohio, for execution upon this judgment.

To all of which appellant by her counsel excepts.

[Duly certified.]

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

Case No. 182

1948, December 20. Transcript of the docket entries of the Common Pleas Court, Clearmont county, Ohio, and original papers filed.

1948, December 30. Bill of exceptions filed.

1949, April 14. Motion to reduce appeal on questions of law and fact to appeal on questions of law only filed.

1949, May 6. Entry reducing appeal on questions of law and fact to appeal on questions of law only filed.

1949, May 27. Bill of exceptions refiled, Court of Appeals.

1949, June 2. Bill of exceptions transmitted back to clerk.

1949, June 2. Briefs of plaintiff-appellant filed.

1949, June 2. Receipt of brief filed.

[fol. 265] 1949, June 17. Briefs of Benguet Consolidated Mining Company, defendant-appellee, filed.

1949, June 17. Receipt for brief filed.

1949, September 8. Entry authorizing withdrawal of counsel filed.

1949, October 13. Heard and submitted to Ross, P. J.

1950, January 27. Opinion filed.

1950, February 16. Entry filed.

1950, March 6. Notice of appeal filed.

1950, May 26. Order to certify record filed.

JUDGMENT

February 16, 1950. This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings applicable to this cause, from the order of the Court of Common Pleas of Clermont county, Ohio, quashing the service of summons upon the defendant, the Benguet Consolidated Mining Company, and was argued by counsel. On consideration whereof, the court find there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant.

It is therefore considered by the court that the judgment of the Court of Common Pleas of Clermont county, Ohio, quashing the service of summons upon the defendant, the Benguet Consolidated Mining Company, be and the same is hereby affirmed, and that the appellee recover from the appellant his costs herein expended, taxed at $ .....

And the court, being of the opinion that there was reasonable grounds for this appeal, allows no penalty.

This cause later came on to be heard upon the application [fol. 266] or motion of the plaintiff-appellant for a rehearing, and upon due consideration thereof the court find said application without merit and does hereby overrule said application or motion and again affirms the judgment of the Common Pleas Court of Clermont county, Ohio, in quashing the service of summons upon the defendant, the Benguet Consolidated Mining Company.

It is further ordered that a special mandate be sent to the Common Pleas Court of Clermont county, Ohio, for execution upon this judgment.

To all of which appellant by her counsel excepts.

[Duly certified]

[fol. 267]. Minute Book 57 Page 561

IN THE SUPREME COURT OF OHIO, JANUARY TERM, 1950
32161

Title of Case

IDONAH SLADE PERKINS, Plaintiff-Appellant,

vs.

BENGUET CONSOLIDATED MINING COMPANY, et al.,
Defendants-Appellees

Attorneys: Gorman, Silversteen & Davis, 808 Traction Bldg., Cincinnati, Ohio; Lucien H. Mercier, Metropolitan Bk. Bldg., Washington, D. C., Ely, White & Davidson, First Natl. Bk. Bldg., Nichols, Speidel & Nichols, Hamilton Bldg., Batavia, Ohio.

Action: Motion for an Order Directing the Court of Appeals of Clermont County to Certify its Record. #181. Appeal from the Court of Appeals of Clermont County.

Memoranda of Pleadings, &c. filed, Writs issued, &c.

Mar. 7, 1950. Notice of appeal and proof of service filed.

Mar. 10, 1950. Motion for an order to certify record and proof of service filed.

Mar. 16, 1950. Appellant's printed brief on motion and proof of service filed.

Apr. 1, 1950. Appellee's brief filed. 4/3/50 proof of service filed.

Apr. 15, 1950. Appellant's reply brief filed. 4/19/50 proof of service filed.

May 24, 1950. Motion for an order directing the Court of Appeals of Clermont County to certify its record allowed. J. 39-450.

May 24, 1950. Order #2607 issued to Clerks of Courts to certify record.

[fol. 268] May 26, 1950. Application to dispense with printing of exhibits filed.

May 26, 1950. Entry granting application to dispense with printing exhibits approved. Carl V. Weygandt, C.J. J. 39-454.

May 31, 1950. Court of Appeals transcript, original papers and bill of exceptions (same as 32162) filed. Box of exhibits.

May 31, 1950. Cause docketed on its merits.

Jun. 1, 1950. Papers taken by Rodenfels. 9/8/50 returned.

Jun 29, 1950. Printed record (same as 32162) and affidavit of service filed. 7/1/50 proof of service filed.

Jul. 5, 1950. Appellant's printed brief and proof of service refiled.

Jul. 5, 1950. Appellant's reply brief and proof of service refiled.

Aug. 4, 1950. Entry extending time for filing Appellee's brief to Sept. 15, 1950. E. S. Matthias, J. J. 39-512.

Sept. 16, 1950. Appellee's printed brief (same as 32162) filed. 10/9/50 proof of service filed.

Jan. 24, 1951. Entry granting Bert H. Long leave to file brief Amicus Curiae herein. Carl V. Weygandt, C. J. J. 39-635.

Jan. 24, 1951. Printed brief of Bert H. Long, Amicus Curiae, filed.

Mar. 21, 1951. Judgment affirmed. J. 39-675.

Mar. 28, 1951. Notified application for rehearing to be filed.

Mar. 31, 1951. Application for rehearing and proof of service filed.

Apr. 18, 1951. Rehearing denied. J. 39-698.

[fol. 269] JOURNAL ENTRIES

32161

Wednesday, May 24, 1950.

Motion for an order directing the Court of Appeals of Clermont County to certify its record.

It is ordered by the Court that this motion be, and the same hereby is, allowed. J. 39-450.

32161

Friday, May 26, 1950.

Entry.

Upon application of appellant and for good cause shown it is hereby ordered that the printing of the exhibits attached to the record of evidence be dispensed with in so far as the

printed record is concerned and that reference shall be made to the original exhibits on file with the Clerk of this court in all matters concerning such omitted portions. Carl V. Weygandt, Chief Justice. J. 39-454.

32161

Friday, August 4, 1950.
Entry.

Upon application of appellees, and for good cause shown, it is ordered that the time for filing appellee's printed brief herein be, and the same hereby is extended to September 15, 1950. Edward S. Matthias, Judge. J. 39-512.

32161

Wednesday, January 24, 1951.
Entry.

Upon application and for good cause shown, it is ordered that Bert H. Long is hereby given leave to file brief amicus curiae herein. Carl V. Weygandt, Chief Justice. J. 39-635.

[fol. 270] 32161

Wednesday, March 21, 1951.

Appeal from the Court of Appeals of Clermont County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Clermont County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellant their costs herein expended taxed at $—.

Ordered, That a special mandate be sent to the Court of Common Pleas of Clermont County, to carry this Judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals, of Clermont County, "for entry." J. 39-675.

32161

Wednesday, April 18, 1951.

Rehearing Docket.

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is denied. J. 39-698.

[fol. 271] COURT OF APPEALS, FIRST APPELLATE DISTRICT, CLERMONT COUNTY, OHIO

No. 181

Supreme Court No. 32161

IDONAH SLADE PERKINS, Plaintiff-Appellant,

vs.

BENGUET CONSOLIDATED MINING COMPANY, et al., Defendants-Appellees

NOTICE OF APPEAL

The above named plaintiff and appellant hereby gives notice of appeal to the Supreme Court of Ohio from a judgment rendered by the Court of Appeals in the above entitled cause on February 15, 1950. Said appeal is on questions of law and is taken to the Supreme Court on condition that a motion to certify the record be allowed by said court.

(S.) Gorman, Silversteen & Davis, Attorneys for Plaintiff Appellant, 808 Traction Bldg., Cincinnati 2, Ohio.

(Duly acknowledged.)

Filed March 7, 1950. Supreme Court of Ohio, Seba H. Miller, Clerk.

[fol. 272] SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS OF CLERMONT COUNTY.

No. 32161

IDONAH SLADE PERKINS, Plaintiff-Appellant,

vs.

BENGUET CONSOLIDATED MINING COMPANY, et al., Defendants-Appellees

MOTION TO CERTIFY RECORD

Now comes Idonah Slade Perkins, plaintiff appellant, herein and represents that on February 15, 1950 the Court of Appeals of Clermont County, Ohio (First Appellate District) in an action pending wherein this appellant was appellant and appellee was appellee, said court rendered a judgment of the Court of Common Pleas of Clermont County, Ohio, said cause being numbered 181 on the dockets of said Court of Appeals. Printed briefs and assignments of error containing statements of questions as presented and statement of the case will be filed within the time and in accordance with the rules of this court.

Appellant further represents that she has heretofore filed Notice of Appeal in the Court of Appeals and a similar notice in this Court as required by law; and further that said case is one of both public and great general interest and that prejudicial error has intervened in the proceedings [fol. 273] had in said Court of Appeals all within the meaning of Article IV, Section 2 of the Constitution of the State of Ohio, and by reason thereof the Hnorable Court has jurisdiction to and ought to review said judgment.

Wherefore, said appellant makes application for an order directing said Court of Appeals of Clermont County to certify its record to the Supreme Court.

(S.) Gorman, Silversteen & Davis, Attorneys for Plaintiff-Appellant, 808 Traction Bldg., Cincinnati 2, Ohio.

(Duly acknowledged.)

Filed March 10, 1950. Supreme Court of Ohio. Seba H. Miller, Clerk.

[fol. 274] Minute Book 57 Page 562

IN THE SUPREME COURT OF OHIO, JANUARY TERM, 1950

32162

Title of Case

IDONAH SLADE PERKINS, Plaintiff-Appellant,

vs.

BENGUET CONSOLIDATED MINING COMPANY, et al., Defendants-Appellees

Attorneys: Gorman, Silversteen & Davis, 808 Traction Bldg., Cincinnati, Ohio, Lucien H. Mercier, Metropolitan Bk. Bldg., Washington, D. C., Ely, White & Davidson, First Natl. Bk. Bldg., Nichols, Speidel & Nichols, Hamilton Bldg., Batavia, Ohio.

Action: Motion for an Order Directing the Court of Appeals of Clermont County to Certify its Record. Appeal from the Court of Appeals of Clermont County.

Memoranda of Pleadings, &c. filed, Writs issued, &c.

Mar. 7, 1950. Notice of appeal and proof of service filed.

Mar. 10, 1950. Motion for an order to certify record and proof of service filed.

Mar. 16, 1950. Appellant's printed brief on motion and proof of service filed.

Apr. 1, 1950. Appellee's brief filed. 4/3/50 proof of service filed.

Apr. 15, 1950. Appellant's reply brief filed. 4/19/50 proof of service filed.

May 24, 1950. Motion for an order directing the Court of Appeals of Clermont County to certify its record allowed. J. 39-450.

May 24, 1950. Order #2612 issued to Clerk of Court to certify record.

[fol. 275] May 26, 1950. Application to dispense with printing exhibits filed.

May 26, 1950. Entry granting application to dispense with printing exhibits approved. Carl V. Weygandt, C. J. J. 39-454.

May 31, 1950. Court of Appeals transcript, original papers and bill of exceptions (same as 32161) (box of exhibits) filed.

May 31, 1950. Cause docketed on its merits.

Jun. 1, 1950. Papers taken by Rodenfels. 9/8/50 returned.

Jun. 29, 1950. Printed record (same as 32161) and affidavit of service filed. 7/1/50 proof of service filed.

Jul. 5, 1950. Appellant's printed brief and proof of service refiled.

Jul. 5, 1950. Appellant's reply brief and proof of service refiled.

Aug. 4, 1950. Entry extending time for filing Appellee's printed brief to Sept. 15, 1950. E. S. Matthias, J. J. 39-512.

Sept. 16, 1950. Appellee's printed brief (same as 32161) filed. 10/9/50 proof of service filed.

Jan. 24, 1951. Entry granting Bert H. Long leave to file brief Amicus Curiae herein. Carl V. Weygandt, C. J. J. 39-635.

Jan. 24, 1951. Printed brief of Bert H. Long, Amicus Curiae, filed.

Mar. 21, 1951. Judgment affirmed. J. 39-675.

Mar. 28, 1951. Notified application for rehearing to be filed.

Mar. 31, 1951. Application for rehearing and proof of service filed.

Apr. 18, 1951. Rehearing denied. J. 39-698.

[fol. 276] JOURNAL ENTRIES

32162

Wednesday, May 24, 1950.

Motion for an order directing the Court of Appeals of Clermont County to certify its record.

It is ordered by the Court that this motion be, and the same hereby is, allowed. J. 39-450.

32162

Friday, May 26, 1950.

Entry.

Upon application of appellant and for good cause shown it is hereby ordered that the printing of the exhibits at-

tached to the record of evidence be dispensed with in so far as the printed record is concerned and that reference shall be made to the original exhibits on file with the Clerk of this court in all matters concerning such omitted portions. Carl V. Weygandt, Chief Justice. J. 39-454.

32162

Friday, August 4, 1950.
Entry.

Upon application of appellees, and for good cause shown, it is ordered that the time for filing appellee's printed brief herein be, and the same hereby is extended to September 15, 1950. Edward S. Matthias, Judge. J. 39-512.

32162

Wednesday, January 24, 1951.
Entry.

Upon application and for good cause shown it is ordered that Bert H. Long is hereby given leave to file brief amicus curiae herein. Carl V. Weygandt, Chief Justice. J. 39-635.

[fol. 277] #32162.

Wednesday, March 21, 1951.

Appeal from the Court of Appeals of Clermont County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Clermont County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellant their costs herein expended taxed at $ - .

Ordered, That a special mandate be sent to the Court of Common Pleas of Clermont County, to carry this Judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Clermont County, "for entry." J. 39-675.

32162

Wednesday, April 18, 1951.
Rehearing Docket.
Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied. J. 39-698.

[fol. 278] COURT OF APPEALS, FIRST APPELLATE DISTRICT, CLERMONT COUNTY, OHIO

Supreme Court No. 32162

No. 182

IDONAH SLADE PERKINS, Plaintiff-Appellant,

vs.

BENGUET CONSOLIDATED MINING COMPANY, et al., Defendant-Appellees

NOTICE OF APPEAL

The above named plaintiff and appellant hereby gives notice of appeal to the Supreme Court of Ohio from a judgment rendered by the Court of Appeals in the above entitled cause on February 15, 1950. Said appeal is on questions of law and is taken to the Supreme Court on condition that a motion to certify the record be allowed by said court.

(S.) Gorman, Silversteen & Davis; Attorneys for Plaintiff-Appellant, 808 Traction Bldg., Cincinnati 2, Ohio.

(Duly acknowledged)

Filed March 7, 1950; Supreme Court of Ohio; Seba H. Miller, Clerk.

[fol. 279] SUPREME COURT OF OHIO

Appeal from the Court of Appeals of Clermont County

No. 32162

IDONAH SLADE PERKINS, Plaintiff-Appellant,

vs.

BENGUET CONSOLIDATED MINING COMPANY, et al.,
Defendants-Appellees

MOTION TO CERTIFY RECORD

Now comes Idonah Slade Perkins, plaintiff-appellant, herein and represents that on February 15, 1950 the Court of Appeals of Clermont County, Ohio (First Appellate District) in an action pending wherein this appellant was appellant and appellee was appellee said court rendered a judgment of the Court of Common Pleas of Clermont County, Ohio, said cause being numbered 182 on the dockets of said Court of Appeals. Printed briefs and assignments of error containing statements of questions as presented and statement of the case will be filed within the time and in accordance with the rules of this court.

Appellant further represents that she has heretofore filed Notice of Appeal in the Court of Appeals and a similar notice in this Court as required by law; and further that said case is one of both public and great general interest and that prejudicial error has intervened in the pro-
[fol. 280] ceedings had in said Court of Appeals, all within the meaning of Article IV, Section 2 of the Constitution of the State of Ohio, and by reason thereof the Honorable Court has jurisdiction to and ought to review said judgment.

WHEREFORE, said appellant makes application for an order directing said Court of Appeals of Clermont County to certify its record to the Supreme Court.

(S.) Gorman, Silversteen & Davis, 808 Traction Building, Cincinnati 2, Ohio, Attorneys for Plaintiff-Appellant.

(Duly acknowledged)

Filed March 10, 1950; Supreme Court of Ohio; Seba H. Miller, Clerk.

[fol. 281] SUPREME COURT OF OHIO

Nos. 32161 and 32162

IDONAH SLADE PERKINS, Plaintiff-Appellant,

vs.

BENGUET CONSOLIDATED MINING COMPANY, et al.,
Defendants-Appellees

ASSIGNMENTS OF ERROR

Idonah Slade Perkins, plaintiff-appellant herein sa that the judgments entered by the Court of Appeals c Clermont County (First Appellate District) in the above entitled causes, which are numbered 181 and 182 in the dockets of said court on February 15, 1950 whereby the said court affirmed judgments of the Court of Common Pleas of Clermont County quashing service upon defendant-appellee, Benguet Consolidated Mining Company, in the aforesaid two causes are erroneous and against the just rights of the appellant herein — the following respects:

1. The Court of Appeals erred in affirming the judgment of the Court of Common Pleas whereas said judgment should have been reversed.

[fol. 282] 2. The Court of Appeals erred in holding that Benguet Consolidated Mining Company was to be considered a foreign corporation.

3. The Court of Appeals erred in affirming the holding of the Court of Common Pleas that Benguet Consolidated Mining Company was not doing business in Ohio.

4. There are other errors apparent on the face of the record prejudicial to the rights of plaintiff-appellant.

WHEREFORE, plaintiff-appellant prays that the judgments of the Court of Appeals in causes numbered 181 and 182 (Clermont County, Court of Common Pleas) be reversed, and that final judgment herein be rendered for plaintiff-appellant.

(S.) Gorman, Silversteen & Davis, 808 Traction Building, Cincinnati 2, Ohio, Attorneys for Plaintiff-Appellant.

Filed March 16, 1950.

Re-filed July 5, 1950; Supreme Court of Ohio; Seba H. Miller, Clerk.

[fol. 283] IN THE SUPREME COURT OF OHIO

OPINION

(Two Cases)

Nos. 32161 and 32162

PERKINS, Appellant,

vs.

BENGUET CONSOLIDATED MINING CO., et al., Appellees

SYLLABUS

1. The doing of business in this state by a foreign corporation, which has not appointed a statutory agent upon whom service of process against the corporation can be made in this state or otherwise consented to service of summons upon it in actions brought in this state, will not make the corporation subject to service of summons in an action in personam brought in the courts of this state to enforce a cause of action not arising in this state and in no way related to the business or activities of the corporation in this state.

2. An organization, organized under the laws of another state or country, is a foreign corporation if it has the essential attributes of a corporation, within the meaning of that word as used in the Ohio statutes, even though it does not have all the attributes of an Ohio corporation.

[fol. 284] 3. In order to be a corporation, an organization must be a legal unit under or be recognized as an entity by the law of the state or country in which it was organized.

4. Where changes in the identity of its shareholders or members do not affect the continued existence of an organization, such organization has the perpetual succession which is an essential attribute of a corporation.

5. An organization may have such perpetual succession and be a corporation even though its right to exist as a corporation is limited to a definite number of years.

6. Whether an organization is a corporation depends not upon the name by which it is called but upon whether it has the essential attributes of a corporation.

7. Where an organization is regarded by the law of the foreign state or country in which it was organized as a

legal unit or entity possessing rights and obligations separate and distinct from those of its shareholders or members and as an organization whose continued existence will not be affected by changes in the identity of its members or shareholders, such organization will be regarded in Ohio as a foreign corporation.

8. The charter of a corporation *may* consist only of the statutes under which it was organized and its articles of incorporation as filed with a public official pursuant to the provisions of those statutes.

9. Extrajudicial admissions of a fact do not necessarily prevent a party from contending that such a fact is otherwise than as indicated by such admissions.

[fol. 285] 10. Where a shareholder of an organization shows no reasonable reliance on any representation of such organization or action amounting to a representation that such organization was not a corporation, or where such shareholder does not show that he was prejudiced in any way by a change in position made in such reliance upon any such action or representation, such organization is not estopped as against such shareholder from contending that it is a corporation.

(Decided March 21, 1951)

APPEALS FROM THE COURT OF APPEALS FOR CLERMONT COUNTY

Plaintiff, a nonresident of Ohio, brought these two actions in the Common Pleas Court of Clermont County against certain parties, including the Benguet Consolidated Mining Company, which is herein referred to as defendant. Defendant is admittedly a *sociedad anonima* organized in 1903 under the laws of the Philippine Islands. Service of process in each case was made in Clermont county upon John W. Haussermann as parent and general manager of defendant. In each case defendant appeared specially and only for the purpose of making a motion to quash service of summons.

Defendant's motions were granted by the trial court on the grounds that (1) defendant is a foreign corporation and, therefore, cannot be served with summons in accordance with the provisions of the Ohio statutes with reference [fol. 286] to service on a partnership, and (2) the business

done by the defendant in Ohio was insufficient to legally authorize service of process upon defendant in Ohio.

The orders of the Common Pleas Court granting those motions were affirmed by the Court of Appeals.

The cases are before this court on appeals, motions to certify having been allowed.

Messrs. Gorman, Silversteen & Davis, for appellant.

Mr. Lucien H. Mercier, Messrs. Ely, White & Davidson and *Messrs. Nichols, Speidel & Nichols, for appellees.*

TAFT, J.:

If defendant is a corporation, then the judgments of the Court of Appeals must be affirmed.

Admittedly, defendant has not appointed any statutory agent upon whom service of process against defendent can be made in Ohio and defendant has not otherwise consented to service of summons upon it in actions brought in Ohio. An examination of the petitions in the instant cases discloses that neither petition states any cause of action in any way related to the business or activities of defendant in Ohio.

The question is not whether a plaintiff can maintain a suit against a nonresident on a transitory cause of action arising outside Ohio and in no way related to the business or activities of the nonresident in Ohio. This court has held that a plaintiff may where "personal service is had" on [fol. 287] such nonresident (*Mattone* v. *Argentina*, 123 Ohio St., 393, 175 N. E., 603) or the defendant has expressly or impliedly consented to service, as by making a voluntary general appearance in the action. *Handy* v. *Insurance Co.*, 37 Ohio St., 366.

However, the doing of business in a state by a foreign corporation, which has not appointed a statutory agent upon whom service of process against the corporation can be made in that state or otherwise consented to service of summons upon it in actions brought in that state, will not make the corporation subject to service of summons in an action in personam brought in the courts of that state to enforce a cause of action in no way related to the business or activities of the corporation in that state. *Old Wayne Mutual Life Assn. of Indianapolis* v. *McDonough*, 204 U. S., 8, 22, 23, 51 L. Ed., 345, 27 S. Ct., 236; *Simon* v. *Southern Ry. Co.*, 236 U. S., 115, 129, 130 and 132, 59 L. Ed., 492,

35 S. Ct., 255. See, also, *Pennsylvania Fire Ins. Co. of Philadelphia* v. *Gold Issue Mining & Milling Co.*, 243 U. S., 93, 95 and 96, 61 L. Ed., 610, 37 S. Ct., 344; *Robert Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, 257 U. S., 213, 215 and 216, 66 L. Ed., 201, 42 S. Ct., 84; *International Shoe Co.* v. *Washington*, 326 U. S., 310, 319 and 320, 90 L. Ed., 95, 66 S. Ct., 154.

An examination of the opinions of the Supreme Court [fol. 288] of the United States in the foregoing cases will clearly disclose that service of summons in such an instance would be void as wanting in due process of law. This problem has given rise to a great volume of litigation. See annotations at 30 A. L. R., 255, and 96 A. L. R., 366. While there are many cases holding to the contrary, we believe that, if, as the foregoing Supreme Court decisions indicate, service of a summons in such an instance would be void as wanting in due process of law within the meaning of that term as used in the 14th Amendment to the Constitution of the United States, this court should follow the law on such a federal constitutional question as announced in those decisions by the Supreme Court of the United States. We are unable to reconcile the decisions in such cases as *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y., 259, 115 N. E., 915, with the views which have heretofore been expressed by the Supreme Court of the United States on this question arising under the federal Constitution. However, the Supreme Court of the United States apparently has distinguished the *Tauza case* and indicated that it would not go to the extent which the New York Court of Appeals went in sustaining the service of process in that case. *International Shoe Co.* v. *Washington, supra*, 318, 319, 320. The cases of *Cone* v. *New Britain Mach. Co.*, 20 F. (2d), 593; *Bennett* v. *Sinclair Refining Co.*, 144 Ohio St., 139, 57 N. E. (2d), 776; *International Harvester Co.* v. *Kentucky*, 234 U. S., 579, 58 L. Ed., 1479, 34 S. Ct. 944; [fol. 289] *Beach* v. *Kerr Turbine Co.*, 243 F., 706; and *United States* v. *Scophony Corp. of America*, 333 U. S., 795, 92 L. Ed., 1091, 68 S. Ct., 855, relied upon by plaintiff, all involved causes of action or complaints arising out of or related to business done in the jurisdiction where the action was brought.

This brings us to the question as to whether defendant is a corporation.

In order to determine the essential attributes of a corporation, as that word is used in our statutes, it is necessary to consider the law of this state. In order to determine whether defendant, as a *sociedad anonima*, has those essential attributes, it is necessary to consider the law of the Philippine Islands under which defendant was organized as a *sociedad anonima*. If, after following the above process, we find that a *sociedad anonima* has, under the laws of the Philippine Islands, the essential attributes of a corporation, as that word is used in our statutes, it will follow that defendant is a corporation within the meaning of our statutes. Otherwise, it is not.

If the corporation law of all jurisdictions were the same, the problem would be relatively simple. However, we know that it is not. Therefore, the mere fact, that an organization does not have all the attributes of an Ohio corporation, does not mean that it is not a foreign corporation within the meaning of those words as used in the Ohio statutes. [fol. 290] The statutory definition of a foreign corporation is of no help. In effect, it defines a corporation as a corporation. Section 8625-2, General Code.

Historically, at common law, a legal unit, or an entity recognized by the law, was either a natural person or not. If not, it was a corporation and consent of the King was necessary for its creation. Blackstone's Commentaries, Book I, 123, 467, 472, 475. In the United States, the necessity of the King's consent was replaced by the necessity of the Legislature's consent. 2 Kent's Commentaries, 276. See Warren's Corporate Advantages Without Incorporation, 9-11; *Bank of Toledo* v. *City of Toledo*, 1 Ohio St., 622, 642.

The decisions of this court have usually recognized that, in order to be a corporation, an organization must be a legal unit or be recognized as an entity by the law of the state or country in which it was organized. *First National Bank of Chicago* v. *Trebein Co.*, 59 Ohio St., 316, 52 N. E., 834; *State, ex rel.*, v. *Standard Oil Co.*, 49 Ohio St., 137, 177, 179, 30 N. E., 279; *Cleveland, Columbus & Cincinnati Rd. Co.* v. *Keary*, 3 Ohio St., 201, 205; *Barrick* v. *Gifford*, 47 Ohio St., 180, 189, 24 N. E., 259; *American Soap Co.* v. *Bogue*, 114 Ohio St., 149, 151, 150 N. E., 743; *State, ex rel. Crabbe, Atty. Genl.*, v. *Thistle Down Jockey Club, Inc.*, 114 Ohio St., 582, 590, 151 N. E., 709; *State ex rel. Chapman*, v. *Urschel*, 104 Ohio St., 172, 181, 182, 135 N. E., 630; and *Marfield* v.

Cincinnati D. & T. Traction Co., 111 Ohio St., 139, 155, 144 N. E., 689, 40 A. L. R., 357.

[fol. 291] As Blackstone pointed out, one of the principal reasons for corporations was to avoid the consequences resulting from the death of one of a group of individuals engaged in a common enterprise. This was done by investing a series of individuals, one after another, with the same rights. Blackstone's Commentaries, 467. It is in this sense that a corporation is said to involve perpetual succession. Those decisions of this court, which cast any doubt on the creation by the Legislature of a legal unit or entity as an essential attribute of a corporation, refer to such perpetual succession as the essential attribute of a corporation. *Cincinnati, Volksblatt Co.* v. *Hoffmeister*, 62 Ohio St., 189, 200, 201, 56 N. E., 1033, 48 L. R. A., 732; and *Andres* v. *Morgan, Trustee*, 62 Ohio St., 236, 245, 56 N. E., 875.

In Ohio, the limitation of liability of shareholders and members has not been regarded as an essential attribute of a corporation. *Snyder* v. *Chamber of Commerce*, 53 Ohio St., 1, 41 N. E., 33; *Express Co.* v. *State*, 55 Ohio St., 69, 78, 79, 44 N. E., 506; and *Brown* v. *Hitchcock*, 36 Ohio St., 667. It is, of course, a common attribute.

In determining whether an organization is a corporation, this court has never seemed very much concerned with what the organization is called. *Express Co.* v. *State, supra.* Even if it is not called a corporation in the state from which it derives consent to be an entity or is called something else, [fol. 292] an organization which has the essential attributes of a corporation is regarded in other states as a corporation. *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wallace, 566, 19 L. Ed., 1029; and *Hemphill* v. *Orloff*, 277 U. S., 537, 550, 72 L. Ed., 978, 48 S. Ct., 577.

Section 116 of the Philippine Code of Commerce, under which defendant was organized, specifically provides that when a *sociedad anonima* is organized under its provisions, it becomes a legal entity.

The decisions of the highest court of the Philippine Islands have consistently and repeatedly treated *sociedad anonima* as legal units or entities having rights and obligations separate and distinct from the rights and obligations of their shareholders. *Strong* v. *Repide*, 6 Phil., 680, 690, 691; *Harden* v. *Benguet Consolidated Mining Co.*, 58 Phil., 141, 146; *Mead* v. *McCullough*, 21 Phil., 95, 106, 121; *Vargas & Co.* v. *Chan Hang Chiu*, 29 Phil., 446, 448; *Compania*

Agrcola de Ultramar v. *Reyes*, 4 Phil., 2, 13; and *Prautch Scholes & Co.* v. *Fernandez*, 1 Ph[illegible]705.

That court has recognized that shares owned by shareholders of a *sociedad anonima* are transferrable without consent of the *sociedad anonima* or of its other shareholders and that changes in the ownership of shares do not in any way affect the rights and liabilities of a *sociedad anonima*. *Strong* v. *Repide*, *supra*, 690.

[fol. 293] Other decisions of that court have recognized a *sociedad anonima* as a corporation. See, for example, *Hanlon* v. *Haussermann*, 40 Phil., 796, 798; and *Reyes* v. *Compania Maritima*, 3 Phil., 519.

Plaintiff contends that, since the existence of defendant as a *sociedad anonima* is limited to 50 years, it does not have perpetual succession. However, unlike a partnership, the death of a shareholder or other change in the identity of shareholders does not affect the continued existence of the *sociedad anonima*. It is in this sense that the term, perpetual succession, is used when referring to it as an essential attribute of a corporation. *Andres* v. *Morgan, Trustee*, *supra*. That an organization may be a corporation, even though its right to exist as a corporation is limited to a definite number of years, has long been recognized in Ohio. See Section 8623-134, General Code.

Plaintiff further contends that a *sociedad anonima* is not a corporation because it receives no charter from the state. However, the statutes under which it was organized provide for the commencement of its existence on the filing of certain papers with a public official. *Compania Agricola de Ultramar* v. *Reyes*, *supra*, 13; and *Mead* v. *McCullough*, *supra*, 106. This is substantially the same procedure now followed in this state in incorporating a corporation under our General Corporation Act. See Section 8624-7, General Code.

[fol. 294] Plaintiff contends further that defendant is estopped to claim that it is a corporation. In support of that contention, plaintiff refers to *Harden* v. *Benguet Consolidated Mining Co.*, *supra*, 141, where a shareholder of the Balatoc Mining Company sued the defendant to cancel shares of Balatoc stock issued to defendant. The action was based upon a provision of the Philippine Corporation Law of 1906, prohibiting a mining corporation from owning stock in another mining corporation. Plaintiff takes the position that, because defendant defended that action on

the ground that it was not a corporation but was a *sociedad anonima*, it is now estopped to maintain that it is a corporation.

It may be observed that, when the 1906 Corporation Code of the Philippine Islands was adopted, Section 75 thereof provided that a previously organized *sociedad anonima* should "be subject to the provisions hereof, so far as such provisions may be applicable and shall be entitled at its option either to continue business as such corporation or to reform and organize under" the Corporation Code. The words of this very section seem to recognize a *sociedad anonima* as a corporation.

In the Harden case, in taking the position that it was a *sociedad anonima* and not a corporation, defendant was obviously contending that the prohibition against owning shares of another mining corporation was applicable only [fol. 295] to a corporation organized under the Corporation Law of 1906 and not to a *sociedad anonima* organized under the law theretofore existing. The Supreme Court of the Philippine Islands refused to decide this question, stating that it could be raised only in an action in *quo warranto*. Therefore, defendant did not secure any advantage by making this contention which was not adopted by the court. Furthermore, plaintiff could not reasonably rely upon that contention to her prejudice. In other words, there is no basis for an estoppel. At most, this contention by defendant was, so far as the instant cases are concerned, an extrajudicial admission which would not be conclusive on this defendant. See *Harrison* v. *Castner*, 11 Ohio St., 339, and *Morgan* v. *Spangler, Sheriff*, 14 Ohio St., 102.

Plaintiff relies further on a statement in the by-laws of deefndant referring to it as an "anonymous partnership or *sociedad anonima*." Apparently, plaintiff's contention is that an anonymous partnership cannot be a corporation. As we have previously pointed out, the question, as to whether an organization is a corporation, depends not upon the name by which it is called but upon whether it has the essential attributes of a corporation.

Plaintiff refers further to a statement placed in a prospectus to sell defendant's stock, that defendant "was organized * * * as a *sociedad anonima* * * *" and [fol. 296] when its 50-year "life expires * * * may apply for a charter to operate as a corporation rather than as a *sociedad anonima*." As brought out in the

Harden case, there might well be differences between a corporation organized under the Philippine Corporation Law of 1906 and a *sociedad anonima*. It does not follow that a *sociedad anonima* is not a corporation.

Finally, plaintiff places great stress upon an answer, filed by defendant in certain litigation between this plaintiff and this defendant in California, in which defendant denied that it "is or ever has been a corporation." However, as defendant points out, plaintiff took the position in that litigation that defendant "was * * * and still is a corporation." From the reported opinion in that litigation, it does not appear that the question, as to whether defendant was or was not a corporation, was of any material importance in the litigation. It may be observed, however, that the California Court of Appeals did consider and treat defendant as a corporation. If, therefore, there was any material controversy between the parties on that question in the California litigation, it would appear that plaintiff prevailed in her contention that defendant was a corporation. *Perkins* v. *Benguet Consolidated Mining Co.*, 55 Cal. App. (2d), 720, 132 P. (2d), 70.

In any event, we see no reason for saying, in the instant [fol. 297] cases, that there is any basis for estopping defendant from contending that it is a corporation. Certainly, plaintiff has shown no reasonable reliance on any action of defendant indicating, or representations of defendant to the effect, that it was not a corporation; and has not shown that she was prejudiced in any way by a change in position made in reliance upon any such action or representation.

This appeal does not involve the question whether plaintiff can maintain this action as one *in rem* by reason of any attachments of assets of the defendant.

Judgments affirmed.

Zimmerman, Stewart, Middleton and Matthias, JJ., concur. Weygandt, C. J., and Hart, J., dissent.

I hereby certify that the foregoing is a true and correct copy of the opinion in the cases of Perkins v. Consolidated Mining Co., numbers 32161 and 32162, as it appears on file in this office.

H. L. Connett, Supreme Court Reporter.

[fols. 287-290] [File endorsement omitted]

SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed March 31, 1951

Now comes plaintiff-appellant and moves that a rehearing be granted in these causes for the following reasons:

1. The defendant-appellee having appeared specially to quash service of summons the court could only determine whether jurisdiction *over the person* had been acquired. This court affirmed on the basis that the court did not have jurisdiction *over the subject matter*. This could only be determined if there was a general appearance by defendant-appellee.

2. On a special appearance of defendant-appellee court was compelled to determine whether Benguet Consolidated Mining Company was doing business in Ohio. This question could not be evaded as it had to be determined in order to decide whether jurisdiction over the "person" had been acquired. It could not be evaded by saying that the court [fol. 291] had no jurisdiction over the subject matter.

3. The first paragraph of the syllabus and pages 119-120 of the opinion are directly contrary to all previous Ohio decisions. There is not a single case in the United States that holds that because the action arose outside of the state and is between nonresidents that service would be void as violating the due process clause.

4. Even the defendant-appellee in its brief admits that the first paragraph of the syllabus and pages 119-120 of the opinion are wrong.

5. The court tried to apply the rule of *forum non conveniens*, which is a federal rule and does not obtain in Ohio, and has no constitutional sanction whatsoever.

6. The appellee did not raise a federal constitutional question; the lower courts did not pass on any federal constitutional question, and it is injected into this cause for the first time by this court itself.

7. The result of this decision would be to make an American citizen go to a foreign country, the Philippine Islands

to try to enforce her rights in the courts of that Commonwealth. The federal courts not even under the rule of *forum non conveniens* would go that far.

8. This matter is of such great importance that plaintiff-appellant is submitting a printed brief to accompany this application for a rehearing.

Respectfully submitted, Gorman, Silversteen & Davis, 808 Traction Building, Cincinnati 2, Ohio.

[fols. 292-305] Brief in Support of Application for Rehearing omitted in printing.

[fol. 306] Clerk's Certificate omitted in printing.

[fol. 307] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 85

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 8, 1951

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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MAY 29 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1950~~ 51

No. 372 85

IDONAH SLADE PERKINS,

Petitioner,

v.

BENGUET CONSOLIDATED MINING COMPANY, an alien business association known as Sociedad Anonima, et al.,

Respondents.

PETITION OF IDONAH SLADE PERKINS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

ROBERT N. GORMAN,
STANLEY A. SILVERSTEIN,
Attorneys for Petitioner
308 Traction Building
Cincinnati 2, Ohio.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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IN THE

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IDONAH SLADE PERKINS,

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BENGUET CONSOLIDATED MINING COMPANY, an alien business association known as a Sociedad Anonima, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Idonah Slade Perkins, prays that a writ of certiorari issue to review the order and judgment entered by the Supreme Court of Ohio on March 21, 1951 and the order denying the application for rehearing entered April 18, 1951 in the two above styled causes, which were consolidated, and in which the identical issue was raised.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 155 Ohio State 116 (advance sheets Ohio Bar issue of March 26, 1951). The opinion of the Court of Appeals is reported in 88 Ohio App. 118 (advance sheets Ohio Bar issue of March 19, 1951). An opinion in a companion case, raising the identical issue here involved is reported as *Perkins* vs. *First National Bank, et al* 37 Ohio Opinions 162.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 25, 1951, and application for rehearing filed in accordance with Rule XX of the Rules of the Supreme Court of Ohio was denied on April 18, 1951. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1251 (3).

The Supreme Court of Ohio on its own motion held that the service of process on Benguet Consolidated Mining Company was "void as wanting in due process of law within the meaning of that term as used in the 14th Amendment to the Constitution of the United States." Respondents, Benguet Consolidated Mining Company, appeared specially in the Court of Common Pleas of Clermont County to quash service of summons. Respondents did not at any time claim that the service of process violated the terms of the Fourteenth Amendment of the Constitution of the United States in the Court of Common Pleas, Court of Appeals or Supreme Court of Ohio. *The Supreme Court on its own motion for the first time held* that the service of process was violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, thereby depriving plaintiff of a right to maintain an action in the courts of Ohio although the alleged foreign corporation was present in Ohio, and per-

sonal service was obtained on the President and General Manager of respondent.

QUESTIONS PRESENTED

Where there is a foreign corporation doing business in Ohio and present in the state, which has not appointed a statutory agent upon whom service can be made, and service is made upon the president and general manager of the foreign corporation, is the service void because the cause of action was brought by a non-resident and the cause of action did not arise in the state and was not related to the business or activities of the corporation in the state? The Supreme Court of Ohio held such service void, *not because of any statute or policy of the State of Ohio, but solely because of the provisions of the Fourteenth Amendment to the Constitution of the United States.*

The decision is directly contrary to that of the Court of Appeals for the Sixth (Ohio) Circuit in *Maichak* vs. *Bertha Consumers*, 25 Fed. (2nd) 257 (C. C. A. 6). On the constitutional question it is likewise in direct conflict with a decision of Judge Learned Hand in *Bomze* vs. *Nardis* Sportswear, 165 Fed. (2nd) 33 (C. C. A. 2).

The Supreme Court of Ohio holds that while a non-resident individual can bring an action against a non-resident individual no matter where the cause of action arose, that because of the due process clause in the Fourteenth Amendment of the Constitution of the United States a non-resident cannot bring such an action against a foreign corporation even if it is doing business in Ohio. Petitioner contends that such a ruling is discriminatory and violates her rights as a citizen of the United States under the provisions of Article II, Section 4 of the Constitution of the United States that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

STATUTE INVOLVED

The Supreme Court of Ohio did not declare any statute void, but held that process served upon a president and general manager was void and violative of the due process clause because the cause of action did not arise in the state, and was not related to the business or activities of the corporation in the state. There is no statute or policy of the state in reference to such service, but Section 11290, Ohio General Code and Section 11276, Ohio General Code are pertinent.

> Section 11290, General Code: "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."
>
> Section 11276, General Code: "An action other than one of those mentioned in sections eleven thousand two hundred and sixty-eight, eleven thousand two hundred and sixty-nine, eleven thousand two hundred and seventy and eleven thousand two hundred and seventy-one against a non-resident of this state, or a foreign corporation, may be brought in any county in which there is property of, or debts owing to the defendant, or where such defendant is found, or where the cause of action or some part thereof, arose."

This case does not come within the exceptions of the statute, and the undisputed and admitted evidence shows that Benguet Consolidated Mining Company had deposits in both the New Richmond National Bank in Clermont County, Ohio, and in the First National Bank of Cincinnati, Ohio.

STATEMENT OF CASE

Benguet Consolidated Mining Company is a sociedad anonima organized under the laws of the Philippine Islands, and engaged in the business of mining gold. While by its own admissions Benguet Consolidated Mining Com-

pany has been held to be a partnership, the Ohio Supreme Court held in this action that it was entitled to be considered a foreign corporation so far as service of process is concerned. From that portion of the ruling we do not petition this court to review the decision, but start with the premise that it is entitled to be considered a foreign corporation.

The petitioner; Idonah Slade Perkins, claimed ownership to stock in Benguet, which, if her contention is correct, it will be admitted total 144,000 shares. The California courts, following a decision of the New York Court of Appeals, held that the petitioner was the owner of these shares in the Benguet Consolidated Mining Company. By way of attachment in California, she recovered from Benguet a judgment for a substantial portion of the *cash* dividends due on her stock. However, Benguet has refused to deliver to her the 120,000 shares of stock due her as stock dividends, and the balance of cash dividends. See *Perkins* vs. *Guaranty Trust Co.*, 274 N. Y. 250, 8 N. E. (2nd) 849, and *Perkins* vs. *Benguet Consolidated Mining Company*, 55 Cal. App. (2nd) 720, 132 Pac. (2nd) 70, rehearing denied 55 Cal. App. (2nd) 775, 132 Pac. (2nd) 102, petition for certiorari denied 319 U. S. 774; 60 Cal. App. (2nd) 845, 141 Pac. (2nd) 19; c. d. 320 U. S. 803, 815.

Thereafter, on April 4, 1947 the petitioner brought two actions in the Court of Common Pleas of Clermont County, Ohio, joining as defendants Benguet Consolidated, John W. Haussermann and the New Richmond National Bank. One action sought recovery of $68,400.00 for cash dividends declared, but never paid to petitioner. The second action was for damages for $2,500,000.00 for damages for wrongfully withholding the stock due her.

Service of summons on Benguet Consolidated Mining Company was made in each case by serving a copy of summons on John W. Haussermann, president, general

manager, controlling member and duly authorized representative agent of said company in the United States and State of Ohio."

On May 6, 1947 Benguet Consolidated Mining Company appeared specially by motion to quash the service of summons. The Court of Common Pleas of Clermont County quashed the service of summons on the ground that Benguet was entitled to be treated as a foreign corporation, and was not doing business in Ohio. The decision was directly contrary to a previous decision in the companion case in Hamilton County, Ohio, raising the identical questions on the identical facts, and between the same parties. See *Perkins* vs. *First National Bank*, et al, 37 Ohio Opinions 162.

The Court of Appeals affirmed the judgment of the Clermont County court. See 88 *Ohio Appeals* 118. A motion to certify the record was allowed by the Supreme Court of Ohio, and on the merits that court affirmed the decisions of the lower court. 155 *Ohio State* 116.

The Supreme Court of Ohio held that a sociedad anonima was entitled to be considered as a foreign corporation under Ohio law, but that *even the doing of business by a foreign corporation in Ohio* will not make the corporation subject to service of process, since the causes of action did not arise in the state and were in no way related to the business or activities of the corporation in the state. The basis of the decision was solely because it was said the service of summons "would be void as wanting in due process of law within the meaning of that term as used in the Fourteenth Amendment to the Constitution of the United States."

The entire portion of the opinion of Judge Taft (pages 119-120) reads as follows:

> "If defendant is a corporation, then the judgments of the Court of Appeals must be affirmed.

"Admittedly, defendant has not appointed any statutory agent upon whom service of process against defendant can be made in Ohio and defendant has not otherwise consented to service of summons upon it in actions brought in Ohio. An examination of the petitions in the instant cases discloses that neither petition states any cause of action in any way related to the business or activities of defendant in Ohio.

"The question is not whether a plaintiff can maintain a suit against a non-resident on a transitory cause of action arising outside Ohio and in no way related to the business or activities of the non-resident in Ohio. The court has held that a plaintiff may where 'personal service is had' on such non-resident (*Mattone vs. Argentina*, 123 Ohio St. 393, 175 N. E. 603) or the defendant has expressly or impliedly consented to service, as by making a voluntary general appearance in the action. *Handy* vs. *Insurance Co.*, 37 Ohio St., 366.

"However, the doing of business in a state by a foreign corporation, which has not appointed a statutory agent upon whom service of process against a corporation can be made in that state or otherwise consented to service of summons upon it in actions brought in that state, will not make the corporation subject to service of summons in an action in personam brought in the courts of that state to enforce a cause of action in no way related to the business or activities of the corporation in that state. *Old Wayne Mutual Life Assn. of Indianapolis* vs. *McDonough*, 204 U. S., 8, 22, 23, 51 L. Ed., 345, 27 S. Ct., 236; *Simon* vs. *Southern Rwy. Co.*, 236 U. S., 115, 129, 130 and 132 59 L. Ed., 492, 35 S. Ct., 255. See, also, *Pennsylvania Fire Ins. Co. of Philadelphia* vs. *Gold Issue Mining & Milling Co.*, 243 U. S., 93, 95 and 96, 61 L. Ed., 610, 37 S. Ct., 344; *Robert Mitchell Furniture Co.* vs. *Selden Breck Construction Co.*, 257 U. S., 213, 215 and 216, 66 L. Ed., 201, 42 S. Ct., 84; *International Shoe Co.* vs. *Washington*, 326 U. S., 310, 319 and 320, 90 L. Ed., 95, 66 S. Ct., 154.

"An examination of the opinions of the Supreme Court of the United States in the foregoing cases will clearly disclose that service of summons in such an instance would be void as wanting in due process of law. This problem has given rise to a great volume of litigation. See annotations at 30 A. L. R., 255, and 96 A. L. R., 366. While there are many cases holding to the contrary, we believe that, if, as the foregoing Supreme Court decisions indicate, *service of a summons in such an instance would be void as wanting in due process of law within the meaning of that term as used in the 14th Amendment to the Constitution of the United States, this court should follow the law on such a federal constitutional question as announced in those decisions by the Supreme Court of the United States.* We are unable to reconcile the decisions in such cases as *Tauza*, vs. *Susquehanna Coal Co.*, 220 N. Y., 259, 115 N. E., 915, with the views which have heretofore been expressed by the Supreme Court of the United States on this question arising under the federal Constitution. However, the Supreme Court of the United States apparently has distinguished the Tauza case and indicated that it would not go to the extent which the New York Court of Appeals went in sustaining the service of process in that case. *International Shoe Co.* vs. *Washington*, supra, 318, 319, 320. The cases of *Cone* vs. *New Britain Mach. Co.*, 20 F. (2nd), 593; *Bennett* vs. *Sinclair Refining Co.*, 144 Ohio St., 139, 57 N. E. (2nd), 776; *International Harvester Co.* vs. *Kentucky*, 234 U. S., 579, 58 L. Ed., 1479; 34 S. Ct., 944; *Beach* vs. *Kerr Turbine Co.*, 243 F., 706; and *United States* vs. *Scophony Corp. of America*, 333 U. S., 795, 92 L. Ed., 1091, 68 S. Ct., 855, relied upon by plaintiff, all involved causes of action or complaints arising out of or related to business done in the jurisdiction where the action was brought."

It will be noticed in both the syllabus of the case, which is the law in Ohio, and the opinion, the court has assumed

Benguet was doing business in Ohio. There was ample evidence to justify this assumption. After Pearl Harbor, Benguet could not do any business in the Philippines and all business transactions emanated from the home and office of John W. Haussermann, the president, in New Richmond, Ohio. In New Richmond, bank accounts were established, directors meetings held, circulars for Securities and Exchange Commission were prepared, and every kind of possible acts to continue Benguet were performed. It did not dissolve during the war, and consequently the headquarters for whatever business Benguet did, for which Haussermann as president continued to draw a salary, and for whatever business was performed or originated, was at New Richmond, Ohio.

While there is nothing in the record to indicate it, the petitioner is actually a citizen of the State of Connecticut, but she does own real estate in Ohio. The opinion of the court would not mean that a resident of Ohio could not bring this action as it would be directly contrary to the provisions of Article I, Section 16, of the Ohio Constitution.

It will be noticed from the opinion that the court has assumed that Benguet Consolidated Mining Company was "doing business" in Ohio. It is, therefore, not necessary to outline the facts showing the business done or that the service was made on a managing agent. The entire question is that assuming a foreign corporation is doing business in Ohio, is it not subject to service of process solely on federal grounds because the cause of action was in no way related to the business of the corporation in the state.

On this point, the court did not review the evidence on the motion to quash, but in deciding the cause merely examined the petitions in both causes of action. Petitioner concedes that the actions for dividends and damages arose

outside of Ohio, but that there was a transfer agent in Ohio, directors meetings held in Ohio, deposits in Ohio banks, and in fact all of the business being done originated in Ohio. If it could not be sued in Ohio, it could not be sued any place other than the Philippine Islands, as all business it did was transacted in Ohio. Under such circumstances the petitioner would have to go to a foreign country for relief and prosecute her action before courts, whose decisions the highest tribunals in New York and California have said reeked with fraud in reference to this controversy.

SPECIFICATIONS OF ERROR

The Supreme Court of Ohio erred:

1. In holding that the due process clause of the Fourteenth Amendment of the Constitution of the United States prevented the institution of an action in Ohio simply because the cause of action was in no way related to the business of the corporation in the state.

2. In holding that such a limitation was not imposed as to a non-resident individual bringing an action against another non-resident individual, but was effective if the defendant was a foreign corporation. Such a holding violates the provisions of Article II, Section 4, of the Constitution of the United States, as well as the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

This is the first time that the exact question has been submitted to this court, although text writers, annotators and authors of legal articles have written much about the jurisdiction over foreign corporations when they were doing business in a state, irrespective of where the cause of action arose.

We have no doubt that a state, by statute or by a constitutional provision could refuse jurisdiction over causes of action arising outside of the state as a matter of public policy. The State of Ohio has not done so, and its opinion reiterates the rule that a non-resident individual can sue a non-resident individual on a transitory action in Ohio, no matter where the cause of action arose. Opinion of court, page 119, approving *Mattone* vs. *Argentina*, 123 Ohio St. 393.

It will be conceded that personal service was obtained upon John W. Haussermann, president and general manager of Benguet Consolidated Mining Company. The opinion assumes, and justifiably so, that Benguet was doing business in Ohio. The court quashed the service of summons solely upon the ground that to uphold it would be a violation of the provisions of the Fourteenth Amendment.

The court in making this decision misinterpreted the meaning and effect of *International Shoe Co.* vs. *Washington*, 326 U. S. 310. There service was upheld, although the presence of the corporation in the State of Washington as that term had been construed was open to question. The court after discussing *Pennoyer* vs. *Neff*, 95 U. S. 714, said at page 316:

> "But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, *if he be not present*, within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notion' of pair play."

Judge Taft, speaking for the Supreme Court, misinterpreted these words. He read them and concluded that even if the corporation was present in the state, there

must be connected and related activities. It was for this reason he said that the decision of *Tauza* vs. *Susquehanna Coal Co.*, 220 N. Y. 259, could not be reconciled with the present law, even though in the International Shoe Company case, the Tauza case had been specifically cited with approval.

His concept of the constitutional aspects of service on foreign corporations is directly opposed to decisions in both the Second and Sixth Circuits.

Judge Learned Hand, in *Bomze* vs. *Nardis Sportswear*, 165 Fed. (2nd) 33, 35 (CCA 2), pointed out:

> "However, we understand that since *Tauza* vs. *Susquehanna Coal Co., supra,* the law of New York has been that a 'foreign corporation' is either 'present' or is not; and once it is found to be 'present,' it becomes subject to process *regardless of whether the particular liability in suit has arisen out of the activities* which collectively constitute the presence."

Such a statement could hardly be the law even in New York if the federal Constitution prohibited causes of action to be entertained if they related to matters or activities of the corporation outside the state.

The court in the International Shoe Company case held that a foreign corporation either had to be present, or have certain minimal contacts in the state, such as were found later by a majority of this court in *Travellers Health Association* vs. *Virginia*, 319 U. S. 641. No member of this court has ever said that there must be not only "presence" but also connected and related contacts to satisfy the due process clause.

The identical question arose in an Ohio case in the Sixth Circuit Court of Appeals some years ago, and that court upheld the service of summons even though the cause of action arose outside of Ohio. In that case, *Maichek* vs. *Bertha Consumers Co.*, 25 Fed. (2nd) 257 (CCA

6), after commenting on Sections 11276 and 11290, Ohio General Code, Judge Dennison said:

> "Construing that statute and the applicable general law, it must be taken as a settled rule in Ohio that a foreign corporation, actually doing business within the state and having therein a managing agent who is served, is subject to be sued therein upon a transitory cause of action arising outside of the state. *Handy* vs. *Ins. Co.*, 37 Ohio St. 366, 370; *Loftus* vs. *Pennsylvania R. R. Co.*, 107 Ohio St. 352, 140 N. E. 94. It is suggested, rather than distinctly claimed, that the state cannot rightly subject a foreign corporation to this burden (see *Robert Mitchell Furniture Co.* vs. *Selden Co.*, 257 U. S. 213, 216, 42 S. Ct. 84, 67 L. Ed. 201); but there has been no such distinct holding by the Supreme Court and we think we should accept the Ohio rule as affecting foreign corporations which locate themselves in the state for business purposes."

In other words, until the Supreme Court of Ohio held otherwise, the Ohio courts had always upheld service where the corporation was found or was present in the state, no matter where the cause of action arose. See also *Southwick Foundry and Machine Co.* vs. *Franz Foundry Co.*, 48 Fed. (2nd) 714 (CCA 6).

This court had this same question before it in *Philadelphia and Reading Railway Company* vs. *McKibbin*, 243 U. S. 265, but found it unnecessary to decide it. As said by Justice Brandeis:

> "As the defendant did no business in New York, we need not consider its other contention that it could not be sued there on a cause of action arising in New Jersey, and in no way connected with the business alleged to be done in New York. On this proposition we express no opinion."

It is now time to decide this proposition, as it is assumed or conceded that Benguet Consolidated Mining

Company was doing business in Ohio, and the question posed is squarely presented.

The Ohio Supreme Court has attempted to apply a rule of *forum non conveniens* as a constitutional doctrine erroneously. See *Barrow* vs. *Kane*, 170 U. S. 100.

However, the decision would not be valid under a statutory or judicial provision of *forum non conveniens*. The Republic of the Philippine Islands is now a foreign country. If the Ohio decision remains unchallenged, the petitioner, an American citizen, would be forced to go to a foreign country to enforce her rights before courts which have demonstrated marked unfriendliness. The president of Benguet is in the jurisdiction, the transfer agent is here, and the directors are all citizens of the United States. Even in a case in the federal courts, the rule of *forum non conveniens* would not be applicable under such circumstances. Cf. *Swift & Co.* vs. *Compania Del Caribe*, 339 U. S. 684.

There is, however, another cogent reason to review and reverse this cause. The Ohio court has given a greater right to a foreign corporation than to a non-resident citizen, but a citizen of the United States. It has discriminated against the non-resident citizen in favor of the foreign corporation.

This court has held since 1886 that foreign corporations are entitled in many matters to equal protection of the laws. *Wheeling Steel Corporation* vs. *Glander*, 337 U. S. 562. In reviewing the record in this case, and if the writ is denied, the court could, without exception, join with Mr. Justice Jackson in saying,

> "So far as I recall this is the first time this Court has held rights of individuals subordinate and inferior to those of organized groups. I think that is an inverted view of the law * * * it is justice turned bottomside up:" *Joint Anti-Fascist Refugee Committee* vs. *McGrath*, 19 U. S. Law Week 4232, 4252.

CONCLUSION

For the reasons stated this petition for writ of certiorari should be granted, and the decision of the Supreme Court of Ohio reversed.

Respectfully submitted,

ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 85

IDONAH SLADE PERKINS,

Petitioner,

v.

BENGUET CONSOLIDATED MINING COMPANY, an alien business association known as a Sociedad Anonima, et al.,

Respondents.

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
808 Traction Building,
Cincinnati 2, Ohio,
Attorneys for Petitioner.

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Much of respondent's brief should be stricken from the files as it does not follow the rules of this court as set forth in *Furness, Withby & Co.* v. *Yang—Tsze Insurance Association,* 242 U. S. 430, 434. At best, it either shows an unfamiliarity with court procedure, or a deliberate attempt to evade the issue by appealing to prejudice through irrelevant and false statements.

The only issue before the court on this petition is whether the service of process on a foreign corporation violated the due process clause. It was conceded by the Supreme Court of Ohio that Benguet Consolidated Mining Company was doing business in Ohio, so we are not concerned with the findings of lower courts. It is admitted that personal service was made upon the President and

General Manager of Benguet Consolidated Mining Company. The only question is whether the service should have been quashed because the cause of action arose outside of the state of Ohio. The Supreme Court of Ohio held such service of process in such an action was void solely "as wanting in due process of law within the meaning of that term as used in the Fourteenth Amendment of the Constitution of the United States," and not because of any public policy of the State of Ohio. In fact the court approved the general public policy of the state, which set forth an opposite rule where individuals were involved (*Mattone* v. *Argentina*, 123 Ohio St. 393).

STATEMENT OF THE CASE

Counsel for respondent attempt to distort the facts, laying emphasis on decisions in the Republic of the Philippine Islands, which decisions our courts have said reeked with fraud. See *Perkins* v. *Benguet Consolidated Mining Co.*, 55 Cal. App. (2d) 720, certiorari denied 319 U. S. 774, 320 U. S. 803, 815. Neither does counsel inform the court that Benguet would not lose one cent of it paid the claims of Mrs. Perkins, as it has been fully indemnified by Perkins. The conspiracy in this case is between Benguet and Perkins to deprive Mrs. Perkins of her stock and property, which they have so far succeeded in doing. The plain truth of the matter is that the California courts have declared that Benguet was bound by the New York court ruling which held that Mrs. Perkins was the absolute owner of the stock in question.

These are matters on the merits. Likewise, on pages 7 and 8 of respondent's brief an attempt is made to re-litigate the question of doing business. We are appealing from the order of the Ohio Supreme Court, which has assumed that Benguet was doing business in Ohio. In fact, on this point there was no disagreement among the

judges of that court, although two of the seven judges dissented on the final ruling.

REASONS FOR GRANTING WRIT

The decision of the Supreme Court of Ohio is not in accord with the decisions of this court. In fact, in the Supreme Court of Ohio, counsel for respondent so conceded. We quote from page 108 of that brief:

> "We do not mean to suggest that a non-resident of the State of Ohio such as the Plaintiff, may not sue a non-resident of the State of Ohio, such as Benguet, in any type of action, even though arising outside of the State of Ohio; but what we do say is that in ascertaining whether valid service of process has been made against a foreign corporation in any given case, the Court must consider the elements that Plaintiff and Defendant are non-residents of the State and that the causes of action did not arise within the State out of anything done within the State; and, so considering these matters, the Court must estimate the inconveniences which would result to the foreign corporation by a trial away from its home or principal place of business."

Here is a concession that, as a constitutional matter, Benguet could be sued in Ohio whether the transaction arose outside of the state or not, but there was an effort made by respondents to ask the court to apply the doctrine of *forum non conveniens*. The Supreme Court quashed service in its opinion solely because it "should follow the law on such a federal constitutional question as announced in those decisions by the Supreme Court of the United States." That is an entirely different ground than the one urged by respondent in his brief as just quoted.

In *Robert Mitchell Furniture Co.* v. *Selden Brick Construction Company,* 257 U. S. 213, which is distinguished in *Maichek* v. *Bertha Consumers,* 25 Fed. (2d) 257 (CCA 6), the agent had been appointed for a job long since completed, and the company had not been doing business in Ohio for some time,—certainly not when service was attempted.

An examination of *Missouri Pacific R. R. Co.* v. *Clarendon Boat Ore Co.,* 257 U. S. 533 and *L. & N. Rwy. Co.* v. *Chatters,* 279 U. S. 320 shows that they are not in point, because in the latter case process was sustained and not quashed. Both these cases concern service upon the statutory, appointed agent, as distinguished from the managing agent. In the *Maichek* case, 25 Fed. (2d) 257 (CCA 6) the court specifically said that *this court* had made no ruling on this question, where service was made on a managing agent, and it further found that the settled rule in Ohio upheld such service:

> "It is suggested rather than distinctly claimed that the state cannot rightly subject a foreign corporation to this burden (see *Robert Mitchell Co.* v. *Selden Co.,* 257 U. S. 213); but there has been no such distinct holding by the Supreme Court, and we think we should accept the Ohio rule as affecting foreign corporations which locate themselves in the state for business."

The Ohio Supreme Court did not overrule any previous decisions or declare any new public policy. It merely misinterpreted decisions by this court, and said that the provisions of the *federal* constitution demanded quashing of service. That is the sole issue before this court, and none other is presented.

The forty eight states are entitled to know whether service may be had on a foreign corporation where it is

doing business in a state, or is there a limitation imposed by the federal constitution that such actions are not maintainable when the cause arose outside of the state.

Are foreign corporations to be able to set up an immunity which individuals could not possibly claim?

Respectfully submitted,

ROBERT N. GORMAN;
STANLEY A. SILVERSTEEN,
808 Traction Building,
Cincinnati 2, Ohio,
Attorneys for Petitioner.

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ROBERT N. GORMAN,
STANLEY A. SILVERSTEIN,
808 Traction Building,
Cincinnati 2, Ohio,
Attorneys for Petitioner.

LUCIEN H. MERCIER,
Metropolitan Bank Bldg.,
Washington, D. C.,

CHARLES O. WHITE,
Batavia, Ohio,
Attorneys for Respondent.

THE JOHNSON & HARDIN CO., LAW PRINTERS

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OPINION BELOW

The opinion of the Supreme Court of Ohio (R. 278-286) is reported in 155 Ohio State 116.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 25, 1951, application for re-hearing was denied on April 18, 1951. The petition for writ of certiorari was filed on May 29, 1951, and was granted on October 8, 1951. The jurisdiction of this court is invoked under the provisions of 28 U. S. C. Section 1257 (3).

QUESTION PRESENTED

The Supreme Court of Ohio on its own motion held that even though Benguet Consolidated Mining Company, respondent herein, was a foreign corporation and doing business in Ohio, that personal service upon the President and General Manager was void as wanting in due process, because the cause of action was in no way related to the business or activities of the corporation in Ohio.

So far as individuals are concerned the court held that in transitory actions where personal service is obtained on an individual the action is maintainable in Ohio even though it arose outside of Ohio and was in no way related to the business or activities of the non resident. (See *Mattone* v. *Argentina*, 123 Ohio St. 393, Approved, R. 280.) The Supreme Court in Ohio held that so far as foreign corporations are concerned the activities of the corporation must be related to the doing business or the service will be void, solely because of the due process clause of the Fourteenth Amendment.

The question presented is whether in a state where there is no contrary rule of public policy, is the due process clause of the Fourteenth Amendment violated by service of summons on a foreign corporation where the basis of the cause of action is in no way related to the business or activities of the foreign corporation in Ohio. The second question is whether there can be one rule for non resident individuals, and a different rule for a foreign corporation, without violating Article IV, Section 2 of the Constitution of the United States, which seeks to prevent unjust discrimination.

STATUTE INVOLVED

The Supreme Court of Ohio did not declare any statute void, but held that process served upon a president and general manager was void and violative of the due process

clause because the cause of action did not arise in the state, and was not related to the business or activities of the corporation in the state. There is no statute or policy of the state in reference to such service; but Section 11290, Ohio General Code and Section 11276, Ohio General Code are pertinent.

> Section 11290, General Code: "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."
>
> Section 11276, General Code: "An action other than one of those mentioned in sections eleven thousand two hundred and sixty-eight, eleven thousand two hundred and sixty-nine, eleven thousand two hundred and seventy and eleven thousand two hundred and seventy-one against a non-resident of this state, or a foreign corporation, may be brought in any county in which there is property of, or debts owing to the defendant, or where such defendant is found, or where the cause of action or some part thereof, arose."

This case does not come within the exceptions of the statute, and the undisputed and admitted evidence shows that Benguet Consolidated Mining Company had deposits in both the New Richmond National Bank in Clermont County, Ohio, and in the First National Bank of Cincinnati, Ohio.

In *Mattone* v. *Argentina*, 123 Ohio St. 393, which was specifically approved by the Supreme Court of Ohio, the construction of these statutes was set forth by that court in the second paragraph of the syllabus:

> "Under existing statutes, the courts of this state have no discretion to refuse to entertain jurisdiction of a transitory tort action brought by a non resident against a non resident upon whom pursuant to Section 11276, General Code, personal service is had in the county wherein such jurisdiction is sought to be invoked."

That rule was specifically upheld in this case (R. 280), but was held not applicable to foreign corporations where the cause of action arose outside of the state, because of the due process clause of the Fourteenth Amendment.

STATEMENT OF CASE

Benguet Consolidated Mining Company is a sociedad anonima organized under the laws of the Philippine Islands, and engaged in the business of mining gold. While by its own admissions Benguet Consolidated Mining Company has been held to be a partnership, the Ohio Supreme Court held in this action that it was entitled to be considered a foreign corporation so far as service of process is concerned. From that portion of the ruling we have not appealed, but start with the premise that it is entitled to be considered a foreign corporation.

The petitioner, Idonah Slade Perkins, claimed ownership to stock in Benguet, which, if her contention is correct, it will be admitted totals 144,000 shares. The California courts, following a decision of the New York Court of Appeals, held that the petitioner was the owner of these shares in the Benguet Consolidated Mining Company. By way of attachment in California, she recovered from Benguet a judgment for a substantial portion of the *cash* dividends due on her stock. However, Benguet has refused to deliver to her the 120,000 shares of stock due her as stock dividends, and the balance of cash dividends. See *Perkins* v. *Guaranty Trust Co.*, 274 N. Y. 250, 8 N. E. (2d) 849, and *Perkins* v. *Benguet Consolidated Mining Company*, 55 Cal. App. (2d) 720, 132 Pac. (2d) 70, rehearing denied 55 Cal. App. (2d) 775, 132 Pac. (2d) 102, petition for certiorari denied 319 U. S. 774; 60 Cal. App. (2d) 845, 141 Pac. (2d) 19, certiorari denied 320 U. S. 803, 815.

Thereafter, on April 4, 1947 the petitioner brought two actions in the Court of Common Pleas of Clermont County,

Ohio, joining as defendants Benguet Consolidated, John W. Haussermann and the New Richmond National Bank. One action sought recovery of $68,400.00 for cash dividends declared, but never paid to petitioner. The second action was for $2,500,000.00 for damages for wrongfully withholding the stock due her.

Service of summons on Benguet Consolidated Mining Company was made in each case by serving a copy of summons on John W. Haussermann, president, general manager, controlling member and duly authorized representative agent of said company in the United States and State of Ohio.

On May 6, 1927, Benguet Consolidated Mining Company appeared specially by motion to quash the service of summons. The Court of Common Pleas of Clermont County quashed the service of summons on the ground that Benguet was entitled to be treated as a foreign corporation, and was not doing business in Ohio. The decision was directly contrary to a previous decision in the companion case in Hamilton County, Ohio, raising the identical questions on the identical facts, and between the same parties. See *Perkins* v. *First National Bank, et al.*, 37 Ohio Opinions 162.

The Court of Appeals affirmed the judgment of the Clermont County court. See 88 *Ohio Appeals* 118. A motion to certify the record was allowed by the Supreme Court of Ohio, and on the merits that court affirmed the decisions of the lower court. 155 *Ohio State* 116.

The Supreme Court of Ohio held that a sociedad anonima was entitled to be considered as a foreign corporation under Ohio law, but that *even the doing of business by a foreign corporation in Ohio* will not make the corporation subject to service of process, since the causes of action did not arise in the state and were in no way related to the business or activities of the corporation in the state. The

basis of the decision was solely because it was said the service of summons "would be void as wanting in due process of law within the meaning of that term as used in the Fourteenth Amendment to the Constitution of the United States."

The entire portion of the opinion of Judge Taft (R. 280-1) reads as follows:

> "If defendant is a corporation, then the judgments of the Court of Appeals must be affirmed.
>
> "Admittedly, defendant has not appointed any statutory agent upon whom service of process against defendant can be made in Ohio and defendant has not otherwise consented to service of summons upon it in actions brought in Ohio. An examination of the petitions in the instant cases discloses that neither petition states any cause of action in any way related to the business or activities of defendant in Ohio.
>
> "The question is not whether a plaintiff can maintain a suit against a non resident on a transitory cause of action arising outside Ohio and in no way related to the business or activities of the non resident in Ohio. The court has held that a plaintiff may where 'personal service is had' on such non resident (*Mattone* vs. *Argentina*, 123 Ohio St. 393, 175 N. E. 603) or the defendant has expressly or impliedly consented to service, as by making a voluntary general appearance in the action. *Handy* vs. *Insurance Co.*, 37 Ohio St., 366.
>
> "However, the doing of business in a state by a foreign corporation, which has not appointed a statutory agent upon whom service of process against a corporation can be made in that state or otherwise consented to service of summons upon it in actions brought in that state, will not make the corporation subject to service of summons in an action in personam brought in courts of that state to enforce a cause of action in no way related to the business or activities of the corporation in that state. *Old Wayne*

Mutual Life Assn. of Indianapolis vs. *McDonough*, 204 U. S., 8, 22, 23, 51 L. Ed., 345, 27 S. Ct., 236; *Simon* vs. *Southern Rwy. Co.*, 236 U. S. 115, 129, 130 and 132, 59 L. Ed., 492, 35 S. Ct., 255. See, also, *Pennsylvania Fire Ins. Co. of Philadelphia* vs. *Gold Issue Mining & Milling Co.*, 243 U. S., 93, 95 and 96, 61 L. Ed., 610, 37 S. Ct., 344; *Robert Mitchell Furniture Co.* vs. *Selden Breck Construction Co.*, 257 U. S., 213, 215 and 216, 66 L. Ed., 201, 42 S. Ct., 84; *International Shoe Co.* vs. *Washington*, 326 U. S., 310, 319, and 320, 90 L. Ed., 95, 66 S. Ct., 154.

"An examination of the opinions of the Supreme Court of the United States in the foregoing cases will clearly disclose that service of summons in such an instance would be void as wanting in due process of law. This problem has given rise to a great volume of litigation. See annotations at 30 A. L. R., 255, and 96 A. L. R., 366. While there are many cases holding to the contrary, we believe that, if, as the foregoing Supreme Court decisions indicate, *service of a summons in such an instance would be void as wanting in due process of law within the meaning of that term as used in the 14th Amendment to the Constitution of the United States, this court should follow the law on such a federal constitutional question as announced in those decisions by the Supreme Court of the United States.* We are unable to reconcile the decisions in such cases as *Tauza* vs. *Susquehanna Coal Co.*, 220 N. Y., 259, 115 N. E., 915, with the views which have heretofore been expressed by the Supreme Court of the United States on this question arising under the federal Constitution. However, the Supreme Court of the United States apparently has distinguished the Tauza case and indicated that it would not go to the extent which the New York Court of Appeals went in sustaining the service of process in that case. *International Shoe Co.* vs. *Washington*, supra, 318, 319, 320. The cases of *Cone* vs. *New Britain Mach. Co.*, 20 F. (2nd), 593; *Bennett* vs. *Sinclair Refining Co.*, 144 Ohio St., 139, 57 N. E. (2nd), 776; *International Harvester*

Co. vs. *Kentucky,* 234 U. S., 579, 58 L. Ed., 1479, 34 S. Ct., 944; *Beach* vs. *Kerr Turbine Co.,* 243 F., 706; and *United States* vs. *Scophony Corp. of America,* 333 U. S., 795, 92 L. Ed., 1091, 68 S. Ct., 855, relied upon by plaintiff, all involved causes of action or complaints arising out of or related to business done in the jurisdiction where the action was brought."

It will be noticed in the syllabus of the case, which is the law in Ohio, the court has assumed Benguet was doing business in Ohio. There was ample evidence to justify this finding. After Pearl Harbor, Benguet could not do any business in the Philippines, and all business transactions emanated from the home and office of John W. Haussermann, the president, in New Richmond, Ohio. In New Richmond, bank accounts were established, directors meetings held, circulars for Securities and Exchange Commission were prepared, and all possible acts to continue Benguet in business were performed. It did not dissolve during the war, and consequently the headquarters for whatever business Benguet did, for which Haussermann as president continued to draw a salary, and for whatever business was performed or originated, was at New Richmond, Ohio.

It will be noticed from the opinion that the court has assumed that Benguet Consolidated Mining Company was "doing business" in Ohio. It is, therefore, not necessary to outline or consider the facts showing the business done or that the service was made on a managing agent. The entire question is that when a foreign corporation is doing business in Ohio, is it not subject to service of process solely on federal grounds because the cause of action was in no way related to the business of the corporation in the state.

On this point, the court did not review the evidence on the motion to quash, *but in deciding the cause merely examined the petitions in both causes of action.* Petitioner

concedes that the actions for dividends and damages arose outside of Ohio, but that there was a transfer agent in Ohio, directors meetings held in Ohio, deposits in Ohio banks, and in fact all of the business being done originated in Ohio. If it could not be sued in Ohio, it could not be sued any place other than the Philippine Islands, as all business it did was transacted in Ohio. Under such circumstances the petitioner would have to go to a foreign country for relief and prosecute her action before courts, whose decisions the highest tribunals in New York and California have said reeked with fraud in reference to this controversy.

SUMMARY OF ARGUMENT

Ohio has decided that so far as individuals are concerned under the provisions of Article I, Section 16 of the Ohio Constitution, if a non resident brings an action in the state court, obtains personal service on the non resident defendant, it does not matter whether the cause of action arose in Ohio or elsewhere. The decision of the Supreme Court of Ohio in this case specifically upheld this rule as to individuals, but held that a similar rule applied to foreign corporations would violate the due process clause of the Fourteenth Amendment.

We shall show that the decisions of this court have never made any such ruling, and that the court clearly misinterpreted the decision in *International Shoe Co.* v. *Washington,* 326 U. S. 310. Once the foreign corporation is "found" or is "present" in a state, there is no federal constitutional provision which requires the process to be quashed.

ARGUMENT

This is the first time that the exact question has been submitted to this court, although text writers, annotators and authors of legal articles have written much about the

jurisdiction over foreign corporations doing business in a state irrespective of where the cause of action arose.

The identical question was before this court in *Philadelphia and Reading Railway Company* v. *McKibbin*, 243 U. S. 265, but it was found unnecessary to decide, Justice Brandeis saying (pp. 268-9):

> "As the defendant did no business in New York we need not consider its other contention that it could not be sued there on a cause of action arising in New Jersey, and in no way connected with the business alleged to be done in New York. On this proposition we express no opinion."

The time to decide this proposition is now before the court. Benguet Consolidated Mining Company was doing business in Ohio, and was, therefore, present in Ohio. Since it was present, personal service on John W. Haussermann, the president and general manager, satisfied every constitutional requirement.

The Supreme Court of Ohio quashed the service of summons solely upon the ground that to uphold it would be a violation of the provisions of the Fourteenth Amendment. This, the Supreme Court of Ohio did on its own motion. In fact counsel for respondents in its brief made the concession that so far as the Constitution was concerned Benguet could be sued in Ohio whether the transaction arose outside of the state or not. Despite the decision in *Mattone* v. *Argentina*, 123 Ohio St. 393, counsel for respondent asked the court to apply the rule of *forum non conveniens*. At page 108 of the brief of respondents in the Supreme Court of Ohio we find this concession:

> "We do not mean to suggest that a non resident of the State of Ohio such as the Plaintiff, may not sue a non resident of the State of Ohio, such as Benguet, in any type of action, even though arising outside of the

> State of Ohio; but what we do say is that in ascertaining whether valid service of process has been made against a foreign corporation in any given case, the Court must consider the elements that Plaintiff and Defendant are non residents of the State and that the causes of action did not arise within the State out of anything done within the State; and, so considering these matters, the Court must estimate the inconveniences which would result to the foreign corporation by a trial away from its home or principal place of business."

The Supreme Court of Ohio, however, quashed the service by stating on its own initiative that it "should follow the law on such federal constitutional question as announced in those decisions by the Supreme Court of the United States" (R. 281).

An examination of the decisions cited by the court fail to show any support for the view taken. The truth is that the Supreme Court of Ohio misinterpreted the plain meaning and effect of *International Shoe Co.* v. *Washington*, 326 U. S. 310. There service was upheld, although the presence of the corporation in the State of Washington as that term had been construed was open to question. The court after discussing *Pennoyer* v. *Neff*, 95 U. S. 714, said at page 316:

> "But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to judgment in personam, *if he be not present*, within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notion' of fair play."

Judge Taft, speaking for the Ohio Supreme Court, misinterpreted these words. He read them and concluded that

even if the corporation was present in the state, there must be connected and related activities. It was for this reason he said that the decision of *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, could not be reconciled with the present law, even though in the *International Shoe Company* case, the *Tauza* case had been specifically cited with approval.

His concept of the constitutional aspects of service on foreign corporations is directly opposed to decisions in both the Second and Sixth Circuits.

Judge Learned Hand, in *Bomze* v. *Nardis Sportswear*, 165 F. (2d) 33, 35 (CCA 2), pointed out:

> "However, we understand that since *Tauza* vs. *Susquehanna Coal Co.*, supra, the law of New York has been that a 'foreign corporation' is either 'present' or is not; and once it is found to be 'present,' it becomes subject to process *regardless of whether the particular liability in suit has arisen out of the activities* which collectively constitute the presence."

Such a statement could hardly be the law even in New York if the federal Constitution prohibited causes of action to be entertained if they related to matters or activities of the corporation outside the state.

The court in the *International Shoe Company* case held that a foreign corporation either had to be present, or have certain minimal contacts in the state, such as were found later by a majority of this court in *Travellers Health Association* v. *Virginia*, 319 U. S. 641. No member of this court has ever said that there must be not only "presence" but also connected and related contacts to satisfy the due process clause.

The identical question arose in an Ohio case in the Sixth Circuit Court of Appeals some years ago, and that court upheld the service of summons even though the cause of action arose outside of Ohio. In that case, *Maichek* v.

Bertha Consumers Co., 25 F. (2d) 257 (CCA 6), after commenting on Sections 11276 and 11290, Ohio General Code, Judge Dennison said:

> "Construing that statute and the applicable general law, it must be taken as a settled rule in Ohio that a foreign corporation, actually doing business within the state and having therein a managing agent who is served, is subject to be sued therein upon a transitory cause of action arising outside of the state. *Handy* vs. *Ins. Co.*, 37 Ohio St. 366, 370; *Loftus* vs. *Pennsylvania R. R. Co.*, 107 Ohio St. 352, 140 N. E. 94. It is suggested, rather than distinctly claimed, that the state cannot rightly subject a foreign corporation to this burden (see *Robert Mitchell Furniture Co.* vs. *Selden Co.*, 257 U. S. 213, 216, 42 S. Ct. 84, 67 L. Ed. 201); but there has been no such distinct holding by the Supreme Court and we think we should accept the Ohio rule as affecting foreign corporations which locate themselves in the state for business purposes."

In other words, until the Supreme Court of Ohio held otherwise, the Ohio courts had always upheld service where the corporation was found or was present in the state, no matter where the cause of action arose. See also *Southwick Foundry and Machine Co.* v. *Franz Foundry Co.*, 48 F. (2d) 714 (CCA 6).

A state may exclude by statute or by judicial decision any non residents bringing actions in the state court where the cause arose outside of the borders of the state, but in *Barrow* v. *Kane*, 170 U. S. 100 it was held that such a type of action would not be barred in the federal courts. In that case, decided as far back as 1898, Mr. Justice Gray said (p. 106):

> "The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

This rule was always followed in the Ohio courts prior to this decision. See *Rainey* v. *Maas*, 51 Fed. 580 (CCA 6), *Beach* v. *Kerr Turbine Co.*, 243 Fed. 706. There is no sound reason to assert that a foreign corporation has some attributes which distinguish it from a natural person so far as process is concerned. Personal service in this action was made on the President and General Manager of the Benguet Consolidated Mining Company. The court having found that Benguet was present in Ohio, it follows that service could not be voided.

The Supreme Court of Ohio attempted to establish *forum non conveniens* as a constitutional doctrine applicable to foreign corporations. The Republic of the Philippine Islands has been a foreign country since July 4, 1946. If the Ohio decision is permitted to stand, the petitioner, an American citizen, would be forced to go to a foreign country to enforce her rights before courts which have demonstrated marked unfriendliness. The President and General Manager of Benguet Consolidated Mining Company is in this jurisdiction as well as the stock transfer agent and directors. Even in the federal courts, the rule of *forum non conveniens* would not be applicable under such circumstances. Cf. *Swift & Co.* v. *Compania Del Caribe*, 339 U. S. 684.

However, the rule of *forum non conveniens* is not a constitutional rule. The doing of business is a much stronger term than mere presence. A finding that a corporation is doing business "makes irrelevant any question of *forum non conveniens*." *Kilpatrick* v. *Texas & Pacific Ry. Co.*, 166 F. (2d) 788, 790, 791 (CCA 2).

The Supreme Court of Ohio failed to recognize the distinction aptly made by Judge Learned Hand in *Latimer* v. *S/A. Industrias Reunidas*, 175 F. (2d) 184, 186 (CCA 2):

> "It may still be true that in theory the issue as to jurisdiction is different from that as to *forum non*

conveniens; for due process may be compatible with situations of greater inconvenience to the corporation than those inconveniences which would support the plea."

In this case there is no necessity for theoretical discussion. The doing of business clearly implies the presence of the foreign corporation in Ohio. Even if a non constitutional plea of *forum non conveniens* were made, this court would not and should not compel an American citizen to go to a foreign country to enforce her rights when the foreign corporation sued is present in Ohio.

CONCLUSION

For the reasons stated the decision of the Supreme Court of Ohio should be reversed, and a finding made that Benguet Consolidated Mining Company was properly served in Ohio.

Respectfully submitted,

ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
808 Traction Building,
Cincinnati 2, Ohio,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 25

IDONAH SLADE PERKINS,
Petitioner,

vs.

BENGUET CONSOLIDATED MINING COMPANY,
Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

LOUIS H. MARCUS,
716 Metropolitan Bank Bldg.,
Washington 5, D. C.

and

CHARLES G. WHITE,
First National Bank Bldg.
Batavia, Ohio,
Attorneys for Respondent.

Made and Filed by Law Reporter Ptg. Co., 518 5th St., Wash., D. C.

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 85

IDONAH SLADE PERKINS,
Petitioner,

vs.

BENGUET CONSOLIDATED MINING COMPANY,
Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes jurisdiction of this Court under the provisions of Section 1251(3) of Title 28 of the United States Code. Said Section is not applicable in a case of this sort.

INTRODUCTION

Whatever else may be said of the instant petition for the issuance of the Writ of Certiorari, it certainly could not be called accurate in many of its representations. For instance, it is not a fact, as stated in the petition (page 3, 2nd par.), that the decision of the Supreme Court of Ohio which Petitioner seeks to have reviewed is directly contrary to the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Maichek* v. *Bertha Consumers*, 25 Fed. (2d) 257, and directly in conflict with the decision of the

Circuit Court of Appeals for the Second Circuit in the case of *Bomze* v. *Nardis Sportswear*, 165 Fed. (2d) 33. An analysis of these cases will appear below.

Nor is it a fact, as stated in the petition (page 2, middle of last paragraph), that Respondent did not at any time claim in the Courts below that the service of process violated the terms of the 14th Amendment of the Constitution —the truth is that Respondent at all times insisted that the question as to whether or not a valid service of process had been made was, after all, a Federal question involving as it did the due process clause of the 14th Amendment of the Constitution.

In its Brief before the Common Pleas Court of Ohio, Respondent said —

> "Allowing a service of process to stand otherwise would violate the due process clause of the Constitution of the United States."

In its Brief before the Appellate Court, Respondent said —

> "We should like to add this thought—all of the Courts have held that the due process clause of the Constitution of the United States is involved in all these cases of service of process on a foreign corporation; that the matter is not one for local law or local interpretation; but is one for the Federal courts with the Supreme Court as the final arbiter."

In its Brief before the Supreme Court of Ohio, Respondent quoted from the decision of this Court in the *Riverside Mills* v. *Menefee case*, 237 U. S, 189, a whole paragraph devoted to the proposition as set forth in the decision in said *Riverside Mills* case, that —

> "one state may not, *without violating the due process clause of the 14th Amendment*, render a judgment against a corporation organized under the laws of another state where such corporation has not come into

> such state for the purpose of doing business therein * * *; and that the mere fact that an officer of a corporation may temporarily be in the state or even permanently reside therein, if not there for the purpose of transacting business for the corporation, or vested with authority by the corporation to transact business in such state, affords no basis for acquiring jurisdiction or *escaping the denial of due process under the 14th Amendment which would result from decreeing against the corporation upon a service had upon such an officer under such circumstances.*"

In *Petitioner's Brief* before the Ohio Appellate Court, she answered the argument of Respondent by saying —

> "Now, precisely what is meant by the phrase 'doing business'? Exactly what activities fulfill the *requirements of this admittedly essential test and, at the same time, due process?* * * * Plaintiff * * * does maintain that the logical conclusion to be drawn from all the authorities cited is that the requirements of Code Section 11290 and the *due process clause* are satisfied if," etc., etc.

Again, Petitioner keeps referring to the fact that Respondent was "present" in Ohio and that it was "doing business" in Ohio, and ends up by saying that there was ample evidence to justify an assumption by the Ohio Supreme Court that Respondent was "present" and was "doing business" in Ohio.

The Courts below certainly did not agree with this contention, because the Common Pleas Court of Ohio found specifically *not only that Respondent was not doing business in Ohio, but that actually, Respondent had no business to be done in the State of Ohio* (R. p. 14, par. nos. 2 and 3; p. 31, par. nos. 2 and 3), and the Court of Appeals, in its opinion and judgments, affirmed the lower Court in every respect on these findings. (R. p. 263, 265.)

Again, Petitioner repeatedly refers to the fact that service was had on John W. Haussermann, Respondent's Presi-

dent and General Manager, from which Petitioner would want this Court to infer that he was Respondent's "managing agent" on whom service could be made under Section 11,290 of the Ohio General Code. The fact is that the lower Court specifically found, and was affirmed by the Appellate Court in this finding, that Respondent *"had no business within Ohio requiring an agent in Ohio to manage and conduct the same"* (R. pp. 14 and 31, par. no. 3); and that "John W. Haussermann, upon whom summons was attempted to be served, *was not the managing agent of the defendant,* Benguet Consolidated Mining Company, *within the meaning of the Ohio statute governing service of process on foreign corporations.*" (R. pp. 14 and 31, par. no. 2.)

STATEMENT OF THE CASE

Petitioner, a resident of Norwalk, Connecticut, in April of 1947 filed two suits against Respondent (a Philippine company organized there in 1903), in the Clermont County, Ohio, Common Pleas Court on causes of action which, if they exist at all, arose in the Philippines. One suit was for cash dividends declared in 1940 and 1941 on shares of stock in the Respondent Company which Petitioner claims she purchased out of her own funds brought to the marriage, and the other was for $2,500,000 in damages for Respondent's failure to deliver to Petitioner certificates representing the stock dividends of 1934 and 1939 on the aforesaid stock.

Petitioner was a resident of the Philippines from November 1913 to and including part of 1934. She was married in the Philippines in January, 1914, and lived there with her husband until they separated in 1930. They are still married. While they were there living together as husband and wife, stock was acquired in the Respondent Company.

The Philippines have a community property system of law much like that of our own community property States, under which property acquired by husbands and wives dur-

ing marriage is community property; and under the Philippine system, the husband is entitled to the possession and control of the community property in the position of administrator thereof so long as the marriage exists and the property has not been separated by judicial decree, and is also entitled to receive all the income and other accruals thereof and thereto in such position as administrator.

Petitioner returned to the Philippines in 1940 for the trial of a case there pending between herself, her husband and Respondent, in which case the issue was as to whether Petitioner owned the stock and the dividends thereon by reason of her having purchased the same out of her own funds, or whether the stock was purchased out of the husband's earnings after marriage and was thus community property over which the husband was entitled to possession and control in his position as administrator thereof and entitled to receive the dividends thereon in such position.

In this case, Petitioner made the same claims for damages and dividends against Respondent which she makes in the two suits she filed in April of 1947 as above noted, excepting that the amount of damages sought was smaller and the dividends claimed were for different years.

In her Statement of the Case, Petitioner does not inform this Court of this Philippine Suit, nor does she inform the Court that the Philippine suit was decided against her in 1947, the Court's holding being that the stock *had not been purchased out of her funds*, but had been purchased out of the husband's earnings after marriage, and was thus community property, the dividends on which were payable to him in his position as administrator thereof. The Court also dismissed the claims for dividends and damages she made against Respondent. This Philippine decision was rendered *after* the decisions in the cases of *Perkins* v. *Guaranty Trust Co.*, 274 N. Y. 250, 8 N. E. (2d) 849 and *Perkins* v. *Benguet Consolidated Mining Co.*, 55 Cal. App.

(2d) 720, 132 Pac. (2d) 70, cited by Petitioner on page 5 of her petition.

Nor does Petitioner advise this Court that the New York judgment in the *Perkins* v. *Guaranty Trust Co.* case, *supra*, on which the California decision, *supra*, was based was made possible *because her husband allowed her to testify, completely uncontradicted*, in the New York litigation of 1933-1937, that the shares of stock in the Respondent Company which forms the basis of the alleged causes of action, had been purchased out of her own separate funds; and that the Philippine decision of 1947 was rendered on the *completely uncontradicted testimony of the husband* that *he* and not *she* had bought all of the shares out of his earnings during the marriage; which testimony she probably could not have contradicted because the husband bolstered the same with checks, check stubs, bank records, broker's records, bookkeeping entries, etc., showing he had purchased the stock out of his earnings after marriage.

Nor does Petitioner tell this Court in her Statement of the Case that by virtue of these two conflicting decisions, made possible by the diametrically opposed testimony of herself and her husband on the same issue, she has collected all of the cash dividends from 1930 through March, 1940; that her husband collected the same cash dividends from 1930 to June, 1937, and has a judgment against Respondent rendered by the Philippine decision of 1947 for the balance of them. *Thus, each has received Court awards for dividends on the same shares* which should have been paid but once, to the loss of Respondent of over $500,000.00 in cash to this date for duplicate dividends on the same shares. Respondent has appealed to the Supreme Court of the Philippines this Philippine decision of 1947.

This Philippine suit decided in 1947 relitigated anew what Petitioner and her husband had theretofore litigated in New York—the only difference being that Respondent was not a party to the New York litigation, but was a party by

way of interpleader in the Philippine litigation decided in 1947.

Petitioner's Statement of the Case also would infer that Respondent had business to be done after Pearl Harbor. Respondent, as Petitioner states, is a Philippine Company engaged in the business of mining gold, all of which is done on its mining properties in the Philippines. Respondent has never conducted operations of any kind outside of the Philippines. The Japanese took control of the mines in December of 1941 and were not driven out until about December of 1945. In driving them out, our United States forces completely demolished Respondent's surface buildings at the mines, and for lack of attention, the mine tunnels were in a state of callapse at the end of 1945.

In 1947, when the Ohio suits were filed, Respondent had not yet resumed its mining operations; Respondent being then engaged in reconstructing its buildings and clearing up its mine tunnels. Respondent's only connection with the United States at the time and before the suits were filed came from the fact that the United States was the only country where, at the war's end, most of the materials, supplies and equipment necessary to rebuild its plant and mines could be purchased. All of such purchases were made by Respondent's Purchasing Agent in San Francisco. None of the purchases were made in Ohio, or from any business organization in Ohio, or by John W. Haussermann, Respondent's President and General Manager, because he knew nothing about such matters. He did, however, sign some orders for machinery, supplies and equipment whenever a supplier demanded that Respondent's Purchasing Agent supply an order signed by an official of Respondent, because he was the only official of Respondent in the United States who could sign them; and he did sign the checks on the Ohio bank accounts to pay for the purchases. The signing of orders and checks was done sometimes in Ohio, sometimes in New York, Washington, Chicago, California or else-

where, depending on where John W. Haussermann happened to be. He was in Ohio less than 50% of his time; he travelled around extensively, but not on Respondent's matters.

John W. Haussermann, Respondent's President and General Manager, was in the United States at the time suits were filed, and had been in the United States since 1941, simply because he could not get back to the Philippines. John W. Haussermann had lived continuously in the Philippines since 1898 save for a few vacations spent in the United States. In 1906 he bought the farm in Clermont County, Ohio, on which he was born, in order to help settle his father's estate; and whenever he came to the United States on vacation or on family matters—Respondent had no business in the United States needing to be attended to—he would make this farm his headquarters.

In late Spring of 1941, Respondent came to the United States on family and personal matters, with reservations to return to the Philippines in September, 1941. The United States Government took over the ship on which he was to sail and cancelled his reservations. His subsequent October and November reservations were similarly cancelled, and his reservations in late December, 1941, were cancelled by reason of Pearl Harbor.

As stated above, the Japanese were driven out of the mines of Respondent in late 1945; and immediately thereafter, John W. Haussermann began his endeavors to procure suitable reservations to return to the Philippines. These endeavors were pursued to the end that he finally procured reservations in January, 1947, for a sailing in August of 1947. The suits were filed in April.

Such were the facts before the Ohio Common Pleas Court, the Ohio Court of Appeals and the Ohio Supreme Court. The two lower Courts found, as stated above, that *not only* was Respondent *not doing business in Ohio, but* that *it had no business to be done in Ohio,* and thus that John W. Haus-

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sermann, even though Respondent's President and General Manager, could not be deemed to be a "managing agent" under the Ohio statute pertaining to the service of process against foreign corporations.

REASONS FOR DENYING THE WRIT

In her attempt to secure the issuance of the writ, Petitioner suggests that the decision of the Ohio Supreme Court as to which the review is sought is not only directly contrary to and directly in conflict with the decisions of the Federal Circuit Courts of Appeal, but further suggests that the Ohio Supreme Court has decided a Federal question of substance not theretofore determined by this Court, and that it has decided such question in a way probably not in accord with the applicable decisions of this Court.

These suggestions of the Petitioner do not square away with the actualities because the fact is that not only is the Ohio Supreme Court decision in accord with the decisions of this Court, but it is also in accord with several decisions of the Federal Circuit Courts of Appeal, and not in conflict with any such decisions.

(a) The Ohio Supreme Court Decision is in Accord with the Decisions of This Court.

A reading of the decisions of this Court cited by the Ohio Supreme Court will show without question that the decision of the Ohio Supreme Court is in accord with such decisions.

For instance, in the case of *Robert Mitchell Furniture Co.* v. *Selden Brick Construction Company*, 257 U. S. 213, 215, 216, an Ohio corporation had sued a Missouri corporation in the United States District Court for the Southern District of Ohio on a contract to be performed in the State of Michigan. The defendant corporation had appointed one Nash as its statutory agent in Ohio upon whom service of process could be made. The lower Court held that the serv-

ice upon Nash was bad. In passing on the question, the Supreme Court of the United States said:

> "The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the state. • • • But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the state without appointing one. *In the latter case, the implication is limited to business transacted within the state. Simon* v. *Southern R. Co.*, 236 U. S. 115, 131, 132, 59 L. ed. 492, 500, 501, 35 S. Ct. Rep. 255; *Old Wayne Mutual Life Assoc.* v. *McDonough*, 204 U. S. 8, 22, 23, 51 L. ed. 345, 351, 27 Sup. Ct. Rep. 236. *Unless the state law, either expressly or by local construction,* gives to the appointment a larger scope, *we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere,* at least, if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence. *Chipman* v. *Thomas B. Jeffery Co., supra. The indications of the Ohio statutes, so far as they go, look to 'liability incurred within this state'.* Gen. Code, §181. *As we know of no decision to the contrary by the supreme court of Ohio, we are of the opinion that the service upon Nash was bad.*"

A notable thing about the decision of the Supreme Court of the United States in this case is the statement that the indications of the Ohio statutes look to "liability incurred within the state".

In the case of *International Shoe Company* v. *Washington*, 326 U. S. 310, 319 and 320, the Supreme Court of the United States held as follows:

> "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to

> obligations, and, *so far as those obligations arise out of or are connected with the activities within the state,* a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (Citing cases.)

The clear inference from the above holding is that if the obligations on which the suit is brought do not arise out of, and are not connected with, the activities of the foreign corporation within the State a procedure which requires the foreign corporation to respond to a suit brought to enforce them would in most instances be undue; and this is the only way of interpreting the rationale of the decision as it appears beginning on Page 317 of the opinion.

The other decisions of this Court cited by the Ohio Supreme Court are to the same effect.

(b) The Federal Question Decided by the Ohio Supreme Court Has Heretofore Been Passed on by This Court.

Petitioner contends that the point of law decided by the Ohio Supreme Court has never been passed on by this Court. The above cases should, of course, set this contention at rest, but we should nevertheless like to point to other decisions of this Court which have passed on the point.

For instance, in the case of *Missouri Pacific RR. Co.* v. *Clarendon Boat Ore Co.*, 257 U. S. 533, this Court said:

> "Still less is it encumbent upon a State in furnishing such process (against a foreign corporation) to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory acts not arising within the State. Indeed, so clear is this that in dealing with the statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, *this Court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the State.*"

Another instance is the decision of this Court in the case of *L. & N. Rwy. Co.* v. *Chatters*, 279 U. S. 320, 324, 328, 73 L. Ed. 711, 716, 718, where this Court said:

> "A foreign corporation is amenable to suit to enforce a personal liability if it is doing business within the jurisdiction in such a manner and to such an extent as to warrant the inference that it is present there. (Citing cases) Even when present and amenable to suit *it may not*, unless it has consented (citing cases), *be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction* (citing cases).
>
> "* * * We address ourselves to the question, decisive of this branch of the case, whether the *Southern*, being present within the State of Louisiana, is amenable to suit, on this cause of action as one arising out of business done within the State, or from such action of the corporation within the State as to subject it to liability there. * * *"

The Southern Railroad claimed that the cause of action did not arise out of anything it had done in Louisiana, but this Court found that, while the cause of action arose outside of the State of Louisiana where suit was brought, nevertheless, the injuries arose on a trip which plaintiff took on a railroad ticket purchased in Louisiana where the Railroad maintained an office to sell tickets for travel on its trains, and thus that the action arose out of business transacted within Louisiana. The Court then said:

> "It was out of this action within the State that the present obligation of Southern arose, although the alleged breach of it occurred elsewhere * * *.
>
> "Where jurisdiction has been denied, the cause of action not only arose outside the State, but it was not shown to have arisen out of any business conducted by the corporation within it or to have had any relation to any corporate act there (citing cases). *In such a case, whether the jurisdiction invoked be deemed to depend upon the presence of the corporation within the State through the doing of business there, or on its consent*

by the designation of an agent, the implication is that the liability to suit does not extend to causes of action which have nothing to do with any act of the corporation within the State. (Citing case) But where the cause of action does arise out of a corporate act within the jurisdiction, the presumption would seem necessarily to be the other way."

Other pronouncements of this Court to the same effect could be cited, but they would be merely cumulative.

We shall now proceed to the consideration of the other points.

(c) The Ohio Supreme Court decision Is Not in Conflict with the Federal Circuit Court Decisions Which Petitioner Cites.

Petitioner states that the Ohio Supreme Court decision is contrary to, and in direct conflict with, the decisions of the Sixth and Second Circuits in the case of *Maichek* v. *Bertha Consumers Co.*, 25 Fed. (2d) 257 (6th Cir.); and *Bomze* v. *Nardis Sportswear Company*, 165 Fed. (2d) 33 (2nd Cir.). It is very difficult to understand how such statement can be made if it be assumed that the decisions were read by counsel for the Petitioner.

In the *Maichek* case, *supra*, the Circuit Court of Appeals sought to ascertain and apply the Ohio law, admitting in doing so that there was some doubt as to the correctness of the conclusion which it reached. The Court said:

"Section 11276 of the Ohio General Code provides that any action, not local, may be brought against a foreign corporation in any county where it may be found, and section 11290 directs that process issued against a foreign corporation doing business in the state and having a managing agent therein may be served upon that agent. Construing that statute and the applicable general law, it must be taken as the settled rule in Ohio that a foreign corporation, actually doing business within the state and having therein a

managing agent who is served, is subject to be sued therein upon a transitory cause of action arising outside of the state. *Handy* v. *Ins. Co.*, 37 Ohio St. 366, 370; *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, 140 N.E. 94. *It is suggested rather than distinctly claimed, that the state cannot rightly subject a foreign corporation to this burden* (see *Robert Mitchell Co.* v. *Selden Co.*, 257 U. S. 213, 216, 42 S. Ct. 84, 67 L.Ed. 201); but there has been no such distinct holding by the Supreme Court and we think we should accept the Ohio rule as affecting foreign corporations which locate themselves in the state for business purposes.

"Sections 179 and 181 of the Ohio General Code provide that, in order to entitle them to do business lawfully in Ohio, foreign corporations must comply with certain conditions which include the appointment of an agent upon whom process may be served, and who is commonly called the statutory agent. *Where personal jurisdiction over the corporation depends upon service on such statutory agent, there are no Ohio decisions as to whether suit will lie in the Ohio courts on a transitory action arising outside the state. It is argued that the decisions of the Supreme Court of the United States, properly compared and interpreted, forbid such action.* *Missouri Pac. R. Co.* v. *Clarendon Co.*, 257 U.S. 533, 42 S. Ct. 210, 66 L.Ed. 354, and cases cited. *It may be that the Ohio decisions arising under the managing agent statute would apply also in the other class of cases, because it is claimed that there is no distinction on principle between them. These things we think it unnecessary to decide.*"

From the foregoing, it seems clear that this case cannot in any wise be said to be contrary to the holding of the Ohio Supreme Court in the case sought to be reviewed by the instant application for the Writ of Certiorari. As we said at the beginning, the Circuit Court expressed some doubt as to its holding.

As to the *Bomze* case, *supra*, the Circuit Court said that no Federal question was involved because the cause of action sued on arose in New York out of the very business

done in New York by the foreign corporation. As to this there can be no question for the Circuit Court of Appeals held:

> "In conclusion we hold that the defendant was doing enough business in New York to satisfy the state decisions; and that, since the cause of action arose—at least as to the New York sales—out of those activities which made the corporation 'present' (in New York), any federal question is set at rest." (Parenthetical expression supplied.)

The Circuit Court of Appeals, in reaching its conclusion as above noted, had this to say, from which it is hard to conceive how Petitioner could suggest that decision as being in direct conflict with the decision of the Ohio Supreme Court in question:

> "However, we understand that since Tauza v. Susquehanna Coal Co., supra, the law of New York has been that a foreign corporation is either 'present', or it is not; and once it is found to be 'present', it becomes subject to process, regardless of whether the particular liability in suit has arisen out of the activities which collectively constitute the 'presence'. How far this has been a reflection of what the New York Courts suppose to be the constitutional limit of their powers is not clear. In Lillibridge, Inc. v. Johnson Bronze Co., supra, Finch, J., declared that the state courts should take the federal decisions as their absolute standard, positive as well as negative; but, when the Court of Appeals affirmed the decision, it wrote no opinion.
>
> "If the state courts do take the Supreme Court decisions in both senses: that is, if they regard the inquiry, how far they may go, as coalesced with the inquiry, how far they will go, International Shoe Co. v. Washington, has effected a change. The Supreme Court there declared that the corporation's 'presence' was to be determined by balancing the opposed interests; the convenience of the obligee against the burden upon the corporation. That is a test not different in kind from that which has been repeatedly used, when the inquiry

is whether it will 'unduly burden' interstate commerce to fetch a corporation, engaged in such commerce, from the place of its principal activities to defend the action. *If that be the test, the question at once becomes relevant whether the action is based upon a liability arising out of the local activities;* for it is almost always less burdensome to subject a corporation to the defense of actions so arising than to those arising elsewhere. Indeed, probably some such notion is at the basis of those decisions which permit a state to subject to process in personam transients who, while within its borders, have incurred a liability under its laws."

(d) The Ohio Supreme Court Decision Is in Accord with the Decisions of the Federal Circuit Courts of Appeal.

Not only is the decision of the Ohio Supreme Court not in conflict with the two decisions of the Federal Circuit Courts of Appeal cited by the Petitioner, but we state that the Ohio Supreme Court decision is in accord with the decisions of the Federal Circuit Courts of Appeal which have passed on the subject. We shall cite but two of such decisions.

As an instance, we should like to cite the case of *American Indemnity Co.* v. *Detroit Fidelity and Surety Co.*, 63 Fed. (2d) 395 (5th Cir.) where the Court said that the upholding of the service of process in a suit against a foreign corporation "should be confined to suits arising from business done" in the State where the suit was brought, and cited Supreme Court cases on the subject.

As another instance, there is the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Rausch* v. *Commercial Travellers Mutual Accident Association of America*, 38 Fed. (2d) 766, (cert. den. 281 U.S. 763, 74 L.Ed. 1171), in which the Court held that service of process in the State of Missouri upon the agent of the insurance company in Missouri on a suit based on a policy contracted for and issued in the State of New York was bad under both the State and the Federal laws.

(e) The Ohio Supreme Court Decision Does Not in Any Wise Violate Section 2 of Article IV of the Constitution of the United States because It Applies to Suits Against Foreign Corporations, Equally Whether the Same Are Filed by a Citizen or a Non-Citizen of Ohio.

In her Second Specification of Errors, Petitioner suggests that the holding of the Supreme Court violates the provisions of Article II, Section 4, of the Constitution. Evidently, this is an error on her part, for what is stated in the Petition refers to Article IV, Section 2, of the Constitution which provides:

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The contentions of Petitioner as to the applicability of this Constitutional provision would seem to be without merit because the decision of the Ohio Supreme Court applies with equal force to a citizen of Ohio as well as to a non-citizen of Ohio. There is no reference whatsoever in the decision of the Supreme Court of Ohio which limits its applicability to a suit filed by a person who is not a citizen of Ohio. The crux of the decision of the Supreme Court of Ohio is that, the suit being against a foreign corporation, it cannot be maintained unless the cause of action grew out of something done by the foreign corporation within the State of Ohio.

CONCLUSION

In conclusion, we should like to state that this Court and the Federal Courts have always held that it is for the State to determine how far it will go in entertaining suits against foreign corporations. This is specifically recognized in, among others, the two cases cited in this Brief—*Robert Mitchell Furniture Co.* v. *Selden Brick Construction Co., supra,* and *Maichek* v. *Bertha Consumers, supra.* In the

last named case, the Circuit Court of Appeals suggested that there were no Ohio decisions as to whether suit would lie in the Ohio Courts on a transitory cause of action arising outside the State where personal jurisdiction over the corporation depended upon the service on a statutory agent, and in the first mentioned case, this Court said that the indications of the Ohio statutes, so far as they go, look to liability incurred within the State of Ohio, and further suggested that unless the State law, either as written or as construed by the Ohio Courts, were otherwise, this Court would not uphold the validity of the service of process against a foreign corporation on a transitory cause of action.

The Supreme Court of Ohio has now interpreted the Ohio statute with reference to service of process against foreign corporations and limited the validity of such service to situations where the cause of action arose out of something done by the foreign corporation within the State of Ohio. This, we say, now becomes the law of Ohio, which must be followed by the Federal Courts inasmuch as it does not transcend against anything prohibited by the due process clause of the Constitution of the United States.

For the reasons stated above, and in the foregoing parts of this Brief, we suggest that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LUCIEN H. MERCER,
CHARLES G. WHITE,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 85.

IDONAH SLADE PERKINS, *Petitioner,*

v.

BENGUET CONSOLIDATED MINING COMPANY, *Respondent.*

BRIEF FOR THE RESPONDENT.

LUCIEN H. MERCIER,
716 Metropolitan Bank Bldg.,
Washington 5, D. C.

CHARLES G. WHITE,
Batavia, Ohio,
Attorneys for Respondent.

ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
808 Traction Building,
Cincinnati 2, Ohio,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 85.

IDONAH SLADE PERKINS, *Petitioner*,

v.

BENGUET CONSOLIDATED MINING COMPANY, *Respondent*.

BRIEF FOR THE RESPONDENT.

JURISDICTION.

Jurisdiction seems to be properly invoked by the Petitioner under the provisions of Section 1157(3) of Title 28 of the United States Code.

THE QUESTION PRESENTED.

The question presented is—

May the State of Ohio, by its statutes or by a judicial interpretation of its statutes, properly refuse to recognize as valid a service of process made in an action *in personam* brought in the Courts of that State against a foreign corporation to enforce a cause of action not arising in the State

and in no way related to the business or activities of the foreign corporation in the State, *if* that corporation has not appointed a statutory agent on whom process may be served in the State, or *if* that corporation has not otherwise consented to service of summons upon it in actions brought in the State.

STATUTES INVOLVED.

Petitioner correctly refers to Sections 11,276 and 11,290 of the Ohio General Code as being the Statutes involved.

Section 11,276 is the "venue" statute, which is to say, the statute which prescribes the county in which a cause of action may be brought. From the quotation of the statute which appears on Page 3 of Petitioner's Brief, it will be brought "in any county in which there is property of, or debts owing to, the defendant", which is the usual and customary statute allowing suits in attachment or by way of garnishment to be brought in the county where the property or debts of the foreign corporation might be. The statute then goes on to provide that the suit may be brought in the county where the defendant is "found" or where the cause of action or some part thereof arose. Under this venue statute, Petitioner could have brought suit in Clermont County by way of attachment, as she did, for a judgment *in rem* against the property which Petitioner states Benguet had in Clermont County, Ohio, although, of course, such a suit could not have been brought in Clermont County as to the deposits in the First National Bank of Cincinnati, Cincinnati being in Hamilton County, Ohio. Also, Petitioner could have brought suit in Clermont County, Ohio, if Benguet were there "found" or if the cause of action arose there.

Section 11,290 is the statute governing service of process in the State of Ohio, no matter in what county suit is brought under the permission of Section 11,276. This statute provides that when the defendant is a foreign cor-

poration, having a managing agent in this State, the service may be upon such agent.

STATEMENT OF THE CASE.

The record facts before the Ohio Supreme Court when it rendered its decision and judgment were these—

Respondent, hereinafter referred to as "Benguet", is a Philippine gold mining company. It has conducted its business, mining operations, solely in the Philippines from 1903, when it was organized, to date. In December, 1941, the Japanese took control of the mines and were not driven out until about December of 1945. In driving them out, our United States forces completely demolished Benguet's surface buildings at the mines, and at the end of 1945, for lack of attention, the mine tunnels were in a state of collapse. In 1947, when the suits were filed, Benguet had not resumed its mining operations; it was rebuilding its physical plant in the Philippines and cleaning out the mine tunnels. Benguet had no office or place of business and no mining operations in the United States or elsewhere than in the Philippines at the time suits were brought or theretofore.

Petitioner, a resident of Norwalk, Connecticut, but a resident of the Philippines beginning with her marriage there in January of 1914, until she left the Philippines in 1933, claiming ownership of stock in Benguet purchased in the Philippines prior to 1930, brought two actions in the Court of Common Pleas of Clermont County, Ohio, in April of 1947, against Benguet, joining as defendants John W. Haussermann, its President and General Manager, and the New Richmond National Bank of New Richmond, Ohio. One action was by way of attachment and sought recovery of $68,400.00 for cash dividends declared by Benguet in 1940 and 1941; and the other action sought $2,500,000.00 in damages for wrongful withholding of the stock which Petitioner claims she owns.

Attempted service of summons on Benguet for a judgment *in personam* was made in each case on John W. Haussermann in the style designated by Petitioner, i.e., as: "President, General Manager, controlling member and duly authorized representative of said company in the United States and State of Ohio". Summons was also served on John W. Haussermann individually and on the New Richmond National Bank.

Benguet, under a special appearance, moved to quash and set aside the attempted service; and the lower Court found as facts, and accordingly entered its judgments (R. p. 14, 21)—

> "2. That John W. Haussermann, upon whom summons was attempted to be served, was not the managing agent of the Defendant, Benguet Consolidated Mining Company, within the meaning of the Ohio statute governing service of process on foreign corporations.
>
> "3. That the Defendant, Benguet Consolidated Mining Company, was not doing business in Ohio in such a sense or in such manner as to authorize a valid service of summons on it under the laws of the State of Ohio; and *that it had no business within Ohio requiring an agent in Ohio to manage and conduct the same.*"

The facts of record before the lower Court on which its findings and judgment were based, in addition to those set out above, were that John W. Haussermann, Benguet's President and General Manager, had been a resident of the Philippines continuously since 1898; that he organized Benguet in 1903 and had been connected with the affairs of Benguet from that time to date of the actions; that in May of 1941, he came to the United States to attend to personal and family matters with reservations to return to the Philippines in September of 1941; that when the time came for his return, the clouds of war were gathering and the United States Government took over the steamship on which he was to return to the Philippines and denied him transportation; that his later reservations for October and

November of 1941 were similarly denied him, and before he could use his December 1941 reservations, the treachery of Pearl Harbor occurred, making it impossible for him to return to the Philippines (R. p. 129).

The facts of record further were that in about 1906, John W. Haussermann acquired from his brothers and sisters, the home farm at New Richmond, Ohio, where he was born; that thereafter he maintained the farm and would make his home there when he came to the United States from the Philippines on vacations; that after the Japanese war began, he made his home at this farm, in New Richmond, Ohio, but that from that time to the date of the suits, less than half of his time was there spent.

The facts of record further were that when the Japanese were finally driven out of the Philippines in or about December of 1945, John W. Haussermann began continuous efforts to obtain suitable reservations to return to the Philippines, and that he was finally able to procure such reservations in January of 1947 for the sailing of August 29 (R. p. 131-2).

The record facts further were that beginning in March of 1946, Benguet, through its staff in the Philippines and a purchasing agent acting for it in San Francisco, began purchasing machinery, supplies and equipment in the United States for the purpose of resuming Benguet's mining operations in the Philippines, none of which machinery, supplies and equipment were purchased in the State of Ohio or from Ohio concerns; and none of which were purchased by John W. Haussermann, the Company's President and General Manager, because he knew nothing of this phase of Benguet's operations (R. p. 156, 169, 177). At times, the suppliers of the machinery, supplies and equipment insisted on the formal orders for the same being signed by a company official and, accordingly, after the purchasing agent had negotiated for and purchased the items on instructions from the Benguet staff in the Philippines, and because John W. Haussermann was the only official of Benguet in the

United States, the purchasing agent would prepare the formal orders for the same and send them to John W. Haussermann for signature, which signing was done sometimes in New York, sometimes in Washington, sometimes in Chicago, sometimes on the West Coast, and sometimes in Ohio, and the signing of the checks on the bank accounts in Ohio in payment of these supplies was also done by John W. Haussermann, wherever he might be, the checks being drawn in the amount and to the order as directed by the Company's Chief of Staff in Manila and by the purchasing agent in San Francisco.

The record facts further were that immediately after the war, two or three out of nine meetings of the Board of Directors of Benguet were held at John W. Haussermann's home in New Richmond, Ohio, the others having been held at Washington, New York, San Francisco, and otherwise than at New Richmond, Ohio; that pre-war, all of the Directors lived in the Philippines; that during the war three out of five Directors of Benguet were interned in the Philippines by the Japanese; that in May of 1945, John W. Haussermann, Jr., son of John W. Haussermann, was elected a Director to replace a Director who had been killed by the Japanese in December of 1944; that in May of 1945, one of the Directors returned to the United States from internment by the Japanese and made her home in Kansas; that at the time of suit, contrary to what Petitioner states in her Brief, at page 14, to the effect that the Directors of Benguet were in the jurisdiction of the Ohio Court, one Director was still in the Philippines, another Director lived in New York, another Director, mentioned above, lived in Kansas, another Director lived in Ohio, and John W. Haussermann, the remaining Director, was still in Ohio awaiting to sail to the Philippines in August of 1947 on the reservations he had procured in January of 1947 (R. p. 131-2).

In short, the record facts were that Benguet had no office or place of business in the United States at time of suits, that it had no business, as that word is understood, done or

to be done in Ohio or in the United States (R. p. 129); that John W. Haussermann, Benguet's President and General Manager, was in the United States temporarily and merely as an incident of the war and not because Benguet's affairs required him to be here (R. p. 131); that but for the war he would have been in the Philippines where he lived continuously since 1898; that during his enforced stay in the United States, he did whatever was asked of him by the staff in the Philippines and by the purchasing agent, and also did what he thought should be done as to the Company's affairs, although he never negotiated for or purchased any machinery, supplies and equipment because he knew nothing about these matters.

On the basis of the foregoing records facts, the lower Court entered the findings and judgments above quoted; and the Court of Appeals for the First Appellate District of Ohio unanimously affirmed the findings and judgments of the Clermont County Court in both suits to the effect that Benguet was not doing business in Ohio; that it had no business to be done within Ohio, and that John W. Haussermann, its President and General Manager upon whom summons was attempted to be served, could not for those reasons be considered the managing agent of Benguet within the meaning of the Ohio statute governing service of process on foreign corporations.

The Ohio Supreme Court also affirmed those findings and judgments.

It is conceded that in Ohio the syllabus of a case is the law of Ohio (Petitioner's Brief p. 8); and the opinion is merely an expression of the thoughts of the Judge who wrote the opinion.

The syllabus of the Ohio Supreme Court decision, so far as is pertinent to the inquiry before this Court, is as follows:

> "1. The doing of business in this state by a foreign corporation, which has not appointed a statutory agent upon whom service of process against the corporation

can be made in this state, or otherwise consented to service of summons upon it in actions brought in this state, will not make the corporation subject to service of summons in an action *in personam* brought in the courts of this state to enforce a cause of action not arising in this state and in no way related to the business or activities of the corporation in this state."

COUNTER STATEMENT OF THE CASE.

Petitioner, on page 4 of her Brief, refers to the cases of *Perkins* v. *Guaranty Trust Co.*, 274 N. Y. 250, 8 N. E. (2d) 849, and *Perkins* v. *Benguet Consolidated Mining Company*, 55 Cal. App. (2d) 720, 132 Pac. (2d) 70, in which certiorari was denied, as holding that she was the owner of the shares of stock in Benguet which forms the basis of her suit. Those decisions were rendered in 1937, as to the New York case, and in 1942, as to the California case.

On page 9 of her Brief, Petitioner states:

> "Under such circumstances, the Petitioner would have to go to a foreign country for relief and prosecution of her actions before courts, whose decisions, the highest tribunals in New York and California have said reeked with fraud in reference to this controversy."

This is rather a strong statement to make—that the decisions of the Philippine courts reeked with fraud; and it is respectfully submitted that neither the New York Court nor the California Court ever made such a statement. What the New York Court said (Paragraphs 16 and 17 of its Opinion), and this was done on the sole testimony of Petitioner, was that the prior Philippine adjudications in cases between Petitioner and her husband over the same shares of stock, in which Benguet was not a party, had been procured through the constructive fraud of the husband, consisting of unfair dealing and overreaching on his part in his transactions with his wife and in erroneously advising her that the Philippine law applied to their property ownership.

In the record of the case before the Clermont County Common Pleas Court, and before the Court of Appeals for the First Appellate District of Ohio, and also in the record before the Ohio Supreme Court, although not printed, was a decision rendered by the Court of First Instance of Manila, Philippines, in April of 1947, subsequent to the New York and California decisions, in a case in which Petitioner and her husband were parties, and in which Benguet was a party by way of interpleader. That case involved the issue of the ownership of the shares of Benguet stock mentioned on Page 4 of Petitioner's Brief and the dividends declared thereon, which were the same shares of stock and dividends involved in the New York and California proceedings. In that case, Petitioner was present at the trial in person and was represented by counsel, and she made practically the same claims, by way of cross-claims, for dividends and damages against Benguet which are made in the two suits involved in this proceeding, excepting that the amount of damages sought was less and the amount of the dividends sought was slightly different. The decision and judgment in that case were that Petitioner was not the owner of the shares of stock in question and was not entitled to receive the dividends thereon, but that the same were part of the community property between herself and her husband; that under the Philippine law the husband was entitled to the possession, control and disposition of the stock and dividends; and that the Court would not follow the New York adjudication because, among other reasons, that New York adjudication had been procured "through the perjured and false testimony of the Defendant, Idonah Slade Perkins, in the aforesaid New York case", which her husband had proven.

In the New York case, which was a suit between Petitioner and her husband over the identical shares of stock in Benguet, in which suit Benguet was not a party, Petitioner's husband allowed Petitioner to testify, *completely uncontradicted*, that the shares of stock had been purchased

by her out of her funds brought to the marriage. In the Philippine case, decided in 1947, Petitioner allowed her husband to testify and prove, *completely uncontradicted*, that the shares of stock had been purchased by her husband out of his earnings during the marriage.

The decision of the Philippine Court rendered in April of 1947 is attached to this Brief as an Appendix.

By reason of the Philippine law and Philippine adjudications prior to 1937, Petitioner's husband received from Benguet the dividends on the stock in question beginning with 1930 through May of 1937. By reason of the New York decision of 1937, on which judgment was entered in 1938, rendered and entered on Petitioner's *uncontradicted* testimony in the suit there between herself and her husband, Petitioner has received from Benguet the dividends beginning with 1930 through March of 1940; and by reason of the Philippine decision and judgment of 1947, rendered in the suit there between Petitioner and her husband, in which Benguet was a party by way of interpleader, and rendered on the *uncontradicted* testimony of the husband, Petitioner's husband has been awarded dividends from 1937 through 1941. Thus, Petitioner and Petitioner's husband have each received court awards for dividends on the same shares which should have been paid but once, to the loss of Benguet in cash to this date for duplicate dividends on the same shares of over $500,000.00. The Philippine suit decided in 1947 relitigated anew what Petitioner and her husband had theretofore litigated in New York—the only difference being that Benguet was not a party to the New York litigation, but was a party by way of interpleader in the Philippine litigation decided in 1947, and was bound by the Philippine decision of 1930-4 and of 1947 because it is subject to the jurisdiction of the Philippine courts by reason of its being a Philippine company.

ARGUMENT.

(a)

The Ohio Supreme Court did not decide that Benguet was doing business in Ohio or that John W. Haussermann was its managing agent in Ohio.

It will be observed from Benguet's Statement of the Question Presented that it is different from that set forth by Petitioner in her Brief:

Petitioner (page 2 of her Brief) states that the Ohio Supreme Court held that Berguet was "doing business in Ohio" and that "personal service upon the President and General Manager was found as wanting in due process because the cause of action was in no way related to the business or activities of the corporation in Ohio.".

We respectfully submit that the Supreme Court of Ohio did not so hold, and that there is not one word in the syllabus or in the opinion so stating.

The Ohio Supreme Court categorically affirmed the findings and judgments of the lower Courts. These findings and judgment were that Benguet was not doing business in Ohio and that John W. Haussermann, its President and General Manager, upon whom attempted service was made, was not the "managing agent" of Benguet within the purview of the Ohio statute governing the service of process because Benguet had no business to be done in Ohio requiring an agent in Ohio to manage and conduct the same.

We must take it, from the categorical affirmance of the lower Courts, that the Ohio Supreme Court did not use the words, "doing of business" and the words, "business or activities", in its syllabus or in its decision in the sense and to the end for which Petitioner contends if the syllabus and the decision are properly analyzed.

In its Statement of the Case, the Supreme Court of Ohio says that the Trial Court granted the Motions to Quash the Service of Summons because, "the business done by the Defendant in Ohio was insufficient to legally authorize serv-

ice of process upon the Defendant in Ohio" for a judgment *in personam*. The Court affirmed these judgments of the lower Court.

We say that upon a proper analysis of the Ohio Supreme Court syllabus and decision, the use of the words, "doing of business", and the words, "business or activities", must be related to the factual record before the Court, which factual record showed as the Ohio Supreme Court itself stated it in effect, that whatever John W. Haussermann, the President and General Manager of Benguet, did in Ohio, it was insufficient to legally authorize service of process upon Benguet in Ohio. As this Court, and all other courts, has and have said, each case on the validity of service of process must stand on its own facts.

So related, the quoted words take on as a meaning the type of business activities which were conducted in Ohio during his enforced stay because of the war by John W. Haussermann, in his capacity as President and General Manager of Benguet, as being insufficient from which to spell out a consent to service of summons upon the actions brought in the State of Ohio. In other words, we say that the syllabus should be read as follows:

> "1. The doing of business in this state (of the type *done* by Benguet) by a foreign corporation * * * will not make the corporation subject to service of summons in an action *in personam* brought in the Courts of this State to enforce a cause of action not arising in this State and in no way related to the business or activities of the corporation in this State." (Parenthetical expression supplied.)

As we have said, the factual record in this case was before the Ohio Supreme Court; and it was very much so because it was set out rather *in extenso* by the Court of Appeals in its decision. (*Perkins* v. *Benguet Consolidated Mining Company*, 88 O. App. 118.)

But, even though the syllabus and decisions are read in the light of giving the words, "doing business" what may be called the usual significance, still—

(b)

The Ohio Supreme Court decision is in accord with the trend of decisions and the pronouncements of this Court.

Taking the syllabus and the decision of the Ohio Supreme Court by itself; without any reference to the factual background of the case, still we say that the decision is a correct interpretation of the decisions of this Court and of the thoughts expressed by this and other Courts.

In other words, if we assume that the Supreme Court of Ohio meant to announce as the rule of public policy in Ohio that no suits would be entertained against a foreign corporation to enforce a cause of action not arising in Ohio and in no way related to the business or activities of the corporation in Ohio *unless* the foreign corporation had appointed a statutory agent in Ohio for service of process or *unless* it had otherwise consented to service in Ohio, such a rule would in no way be in contravention of any decision or pronouncement of this Court.

The Ohio Supreme Court decision would permit suits to be brought in Ohio against any foreign corporation which had appointed a statutory agent in Ohio, no matter whether or not the cause of action arose in Ohio and no matter whether or not the cause of action was related to the business or activities of the foreign corporation in Ohio. It would also permit such suits to be brought if the foreign corporation otherwise consented to service.

The only suits which would be barred would be those brought against a foreign corporation in other situations, i.e., where the foreign corporation has not appointed a statutory agent or otherwise consented to service; and even then, not all types of actions would be barred—it would only be those actions where the cause did not arise in Ohio or was in no way related to the business or activities of the corporation in Ohio.

There is ample warrant in the decisions and thoughts on the subject for such a rule of public policy. The Ohio Su-

preme Court itself heretofore announced what is tantamount to the same rule in the case of *Loftus* v. *Pennsylvania RR. Co.*, 107 O. S. 352, where, as to a cause of action arising in Pennsylvania, the Court said:

> "It has not been made to appear that this Plaintiff has been denied access to the courts of Pennsylvania, or that in any manner substantial prejudice results to him by the Ohio courts having sustained the motion to quash. Again, it is difficult to see how he can be prejudiced by being required to litigate his cause at the place of his residence, or at the place of the injury, in the state of Pennsylvania, where no doubt his witnesses reside, and where his litigation can be prosecuted at much less expense than in the distant jurisdiction of the state of Ohio. We are not required to justify the acts of the Legislature, but it might very pertinently be remarked at this point that the courts of our state are maintained at considerable expense, and only a small fraction of such expense is charged to litigants, the major portion being met by taxes and levied upon the property of the state. The constitutional mandate that all courts shall be open does not require that the burdens of taxation in a single state shall be further increased to provide remedies by judicial process for those who for reasons of their own prefer to reside in other states. It may be further remarked that the statute makes ample provisions for a stranger within our gates if injured in person or property, while sojourning in or traveling through the state."

And, in the case of *Iron City Produce Co.* v. *American Rwy. Express Co.*, 22 Ohio App. 165, 153 N. E. 316, the Ohio court, following the doctrine of *Davis* v. *Farmers Co-op. Equity Co.*, 262 U. S. 312, 67 L. Ed. 996, held invalid an attempted service of process against a foreign corporation in an action which arose outside the State of Ohio as being repugnant to the provisions of the Constitution of the United States.

The foregoing pronouncements exactly square away with holdings of this Court. The *Loftus* case follows the rule of

forum *non conveniens*, and this Court, in the *International Shoe* v. *Washington* case, 326 U. S. 310, 317, 90 L. ed. 95, 102, said that—

> "An 'estimate' of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."

The *Iron City Produce* case follows not only the doctrine of the *Davis* case, *supra*, but also follows the rule announced in a number of other cases.

The latest pronouncement of the Ohio Courts, the decision here under review, also follows the decisions and suggestions of this Court. Among them are the following:

For instance, in the case of *Robert Mitchell Furniture Co.* v. *Selden Breck Construction Company*, 257 U. S. 213, 215, 216, an Ohio corporation had sued a Missouri corporation in the United States District Court for the Southern District of Ohio on a contract to be performed in the State of Michigan. The defendant corporation had appointed one Nash as its statutory agent in Ohio upon whom service of process could be made. The lower Court held that the service upon Nash was bad. In passing on the question, this Court said:

> "The purpose in requiring the appointment of such an agent is primarily to secure to local jurisdiction in respect of business transacted within the state. * * * But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the state without appointing one. *In the latter case, the implication is limited to business transacted within the state.* *Simon* v. *Southern R. Co.*, 236 U. S. 115, 131, 132, 59 L. ed. 492, 500, 501, 35 S. Ct. Rep. 255; *Old Wayne Mutual Life Assoc.* v. *McDonough*, 204 U. S. 8, 22, 23, 51 L. ed. 345, 351, 27 Sup. Ct. Rep. 236. * * * *The indications of the Ohio statutes, so far as they go, look to 'liability incurred within this state'.* Gen. Code, § 181.

As we know of no decision to the contrary by the supreme court of Ohio, we are of the opinion that the service upon Nash was bad."

A notable thing about the decision of the Supreme Court of the United States in this case is the statement that the indications of the Ohio statutes look to "liability incurred within the state".

Again, in the case of *Missouri Pacific RR. Co.* v. *Clarendon Boat Ore Co.*, 257 U. S. 533, this Court said:

"Still less is it encumbent upon a State in furnishing such process (against a foreign corporation) to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory acts not arising within the State. Indeed, so clear is this that in dealing with the statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, *this Court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the State.*"

Another instance is the decision of this Court in the case of *L. & N. Rwy. Co.* v. *Chatters*, 279 U. S. 320, 324, 328, 73 L. ed. 711, 716, 718, where this Court said:

"A foreign corporation is amenable to suit to enforce a personal liability if it is doing business within the jurisdiction in such a manner and to such an extent as to warrant the inference that it is present there. (Citing cases) Even when present and amenable to suit *it may not*, unless it has consented (citing cases), *be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction* (citing cases).

"* * * We address ourselves to the question, decisive of this branch of the case, whether the *Southern*, being present within the State of Louisiana, is amenable to suit, on this cause of action as one arising out of business done within the State, or from such action of the

corporation within the State as to subject it to liability there. * * *"

The Southern Railroad claimed that the cause of action did not arise out of anything it had done in Louisiana, but this Court found that, while the cause of action arose outside of the State of Louisiana where suit was brought, nevertheless, the injuries arose on a trip which plaintiff took on a railroad ticket purchased in Louisiana where the Railroad maintained an office to sell tickets for travel on its trains, and thus that the action arose out of business transacted within Louisiana. The Court then said:

> "It was out of this action within the State that the present obligation of Southern arose, although the alleged breach of it occurred elsewhere * * *.
>
> "Where jurisdiction has been denied, the cause of action not only arose outside the State, but it was not shown to have arisen out of any business conducted by the corporation within it or to have had any relation to any corporate act there (citing cases). *In such a case, whether the jurisdiction invoked be deemed to depend upon the presence of the corporation within the State through the doing of business there, or on its consent by the designation of an agent, the implication is that the liability to suit does not extend to causes of action which have nothing to do with any act of the corporation within the State.* (Citing case) But where the cause of action does arise out of a corporate act within the jurisdiction, the presumption would seem necessarily to be the other way."

Finally, in the case of *International Shoe Co.* v. *Washington, supra,* this Court said:

> "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations and, *so far as those obligations arise out of or in connection with the activities within the state,* a procedure which requires the corporation to respond to

a suit brought to enforce them can, in most instances, hardly be said to be undue."

In the aforesaid case this Court recognized (page 318) its prior adjudications, "that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity."; and this Court cited its prior adjudications on the subject. Of course, the decision in the *International Shoe Co.* case was correct on the facts present before the Court in that case because the very activity of the *International Shoe Co.* in the state of Washington was what gave rise to the cause of action and to the tax sought to be collected under the cause of action.

In closing this point of the argument, we should like to refer to the excellent Article in the *Harvard Law Review*, Vol. 50, p. 113, where, in summarization, it is stated:

> "Generally, causes of action arising out of business done within the state by the corporation is invariously exercised by the Courts. If the cause of action arose outside the state, the tendency is to refuse to exercise jurisdiction whether the action is brought by a resident or nonresident plaintiff (citing several cases)."

Numerous other decisions could be cited and quoted but they would be merely cumulative in their effect.

(c)

The Ohio Supreme Court decision does not in any wise violate Section 2, Clause 1 of Article IV of the Constitution of the United States.

In her Brief (p. 2) Petitioner states that one of the questions posed by the Ohio Supreme Court decision is whether there can be one rule for non-resident individuals and a different rule for foreign corporations, without violating Article IV, Section 2, Clause 1 of the Con-

stitution of the United States, which seeks to prevent unjust discrimination. The Clause referred to is as follows:

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

We cannot understand how this Clause comes into question or operation in this case. Certainly, the decision of the Supreme Court of Ohio does not in any wise deprive petitioner, in her position as a resident and citizen of the State of Connecticut, of any privilege or of any immunity which are given by the decision to the residents and citizens of the State of Ohio. The decision applies with equal force whether the action is brought by a plaintiff resident or non-resident, citizen or non-citizen of the State of Ohio.

Even though it were that the Ohio Supreme Court decision gave citizens of the State of Ohio greater rights in suing a foreign corporation in the State of Ohio than were given to a non-citizen of Ohio, it has been repeatedly held that this would not in any wise conflict with the provisions of Clause 1, Section 2 of Article IV of the Constitution of the United States.

For instance, in the case of *Central Railroad, etc.* v. *Georgia Construction, etc. Co.*, 32 S. C. 319, 11 S. E. 192, the statute provided that—

> "An action against a corporation created by or under the laws of any other State, government or country, may be brought in the Circuit Court—
>
> (1) by any resident of this State, for any cause of action; or
>
> (2) by a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated, within the State."

The Court held that this was not violative of Clause 1 of Section 2 of Article IV of the Constitution.

In the case of *Robbins* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 323, 19 N. E. 625, 2 L. R. A. 636, the statute was that a resident of the State, or a domestic corporation, could maintain an action against a foreign corporation for any cause, no matter where it arose; but that an action by a non-resident plaintiff against a foreign corporation could only be maintained in the cases specified but in no event for a cause of action which arose outside the State limits. The Court there held that this statute did not in any wise conflict with Clause 1, Section 2 of Article IV of the Constitution.

In the case of *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373, this Court had under consideration the aforesaid New York statute which permitted the bringing of an action against a foreign corporation within the State of New York by a non-resident only where the cause of action arose within the State, which statute gave to residents of New York and to New York domestic corporations the right to maintain an action against a foreign corporation for any cause, no matter where it arose. This Court held that this statute of New York was not in any wise unconstitutional and did not violate Section 2, Clause 1 of Article IV of the Constitution.

In the case of *Grovey* v. *Washington Nat. Ins. Co.*, 196 Ark. 697, 119 S. W. (2d) 503, it was held that the State court's refusal of jurisdiction over an action by a non-resident of the State against a foreign insurance company authorized to do business in the State for breach of an insurance agency contract executed outside of the State, was not a violation of Section 2, Clause 1 of Article IV of the Constitution.

And we refer the Court also to the *Loftus* case, *supra*, a decision by the Ohio Supreme Court.

While it is true that the Ohio Supreme Court has decided (*Mattone* v. *Argentina*, 123 Ohio State 393, 175 N. E. 603) that an individual non-resident against whom "personal

service is had", may be sued in the State of Ohio on a transitory cause of action arising outside of Ohio and in no way related to the business or activities of the non-resident in Ohio, still the decision under review cannot in any wise be called inconsistent with this holding. The fact is that the decision under review permits suits in the State of Ohio against foreign corporations in causes of action not arising in Ohio and in no way related to the business or activities of the foreign corporation in Ohio, where, "personal service is had". The decision specifically so states. If the foreign corporation has appointed a statutory agent upon whom service of process may be had, service on such agent would, of course, be personal service, and if the corporation otherwise has consented to service of process, still personal service would be had.

But even though the decision under review announced a rule as applicable to a foreign corporation defendant different than that announced in the *Mattone-Argentina* case, *supra*, as applicable to an individual as a defendant, nevertheless the cases cited under this point are all to the effect, on principle, that this would not violate the provisions of the Constitution of the United States.

The reason for this is quite clear. An individual may migrate from city to city and from State to State with no permanent place of abode, and by the simple expedient of such migration, the individual could escape liability for his actions, if he could not be sued wherever personal service of process could be had against him, no matter where the cause of action arose. This is not true with reference to corporations. Corporations have a permanent place of abode where any sort of suit may be maintained against them. The courts of the State or country of the creation of the corporation are always open for actions against the corporation whether by a resident or non-resident plaintiff and no matter where the cause of action arose. In the early days, the thoughts of the Courts were that a corporation could not be sued elsewhere than in the State or country

which created it. Later, this notion of the law very properly and wisely changed until, at the present day, the Courts are all agreed that, if a corporation enters into another State to there perform some part of its functions from the performance of which a cause of action arises within that foreign State, the corporation may be sued in such foreign State on such cause of action. In the evolution of this principle of law, however, the question has often arisen as to whether or not suits against corporations in States foreign to that of their creation could be entertained on causes of action not arising within the State where sued and in no way related to or arising out of the business transacted in the State where sued.

On this score, it has not been thought that the refusal of jurisdiction against a foreign corporation on causes of action which arose outside the State and which were in no way related to anything done by the foreign corporation within the State, was in anywise violative of the provisions of the Constitution of the United States; and as to this, we refer to the cases cited above.

There is no decision of the Supreme Court of the United States holding that under any of the provisions of the Constitution, a State must maintain courts within which suits may be brought against foreign corporations on causes of action arising outside of the State.

Actually, this Court in the case of *Anglo-American Provision Co.* v. *Davis Provision Co., supra*, held specifically that the Constitution of the United States does not reqnire a State to provide such Courts, and also specifically ruled that the New York statute was not unconstitutional in its provision that an action against a foreign corporation could be maintained in the State of New York by a non-resident of New York or by another foreign corporation only where the cause of action arose within the State.

A case on the subject is that of *Atchison, Topeka & Santa Fe* v. *Weeks*, 254 Fed. 513 (C. C. A. 5th; Cert. den. 249 U. S. 602). In that case, the Court held that in order that a cor-

poration, foreign to a State, may be subject to process in the foreign State, it must have placed itself, with reference to the cause of action, in the same position as an individual. The Court said that this may result from the establishment in the State of the main office of the corporation, and the discharge there of the principal corporate functions. The action which had been brought in that case had arisen in the State of California and suit had been brought in the State of Texas. Even though the foreign corporation maintained a General Manager in Texas in an office from which he directed the operations of the railroad by letters and telegrams to its officers and agents in other States, and even though the railroad's General Superintendent, Train Masters, General Foremen, and Mechanical Superintendent were also at this office and maintained their residence in Texas and assisted in directing the Company's operations outside of the State, with a clerical force for that purpose, the Court held that the Company had not placed itself in such position in Texas that would require the upholding service of process on a cause of action which did not arise out of the activities in Texas but which arose by reason of the operation of the railroad in the State of California.

(d)

The Ohio Supreme Court decision is not in conflict with the Federal Circuit Court decisions which petitioner cites.

Petitioner states that the Ohio Supreme Court decision is contrary to, and in direct conflict with, the decisions of the Sixth and Second Circuits in the case of *Maichek* v. *Bertha Consumers Co.*, 25 Fed. (2d) 257 (6th Cir.); and *Bomze* v. *Nardis Sportswear Company*, 165 Fed. (2d) 33 (2nd Cir.). It is very difficult to understand how such statement can be made.

In the *Maichek* case, *supra*, the Circuit Court of Appeals sought to ascertain and apply the Ohio law, admitting in

doing so that there was some doubt as to the correctness of the conclusion which it reached. The Court said:

> "Section 11276 of the Ohio General Code provides that any action, not local, may be brought against a foreign corporation in any county where it may be found, and section 11290 directs that process issued against a foreign corporation doing business in the state and having a managing agent therein may be served upon that agent. Construing that statute and the applicable general law, it must be taken as the settled rule in Ohio that a foreign corporation, actually doing business within the state and having therein a managing agent who is served, is subject to be sued therein upon a transitory cause of action arising outside of the state. *Handy* v. *Ins. Co.*, 37 Ohio St. 366, 370; *Loftus* v. *Pennylvania R. Co.*, 107 Ohio St. 352, 140 N. E. 94. *It is suggested rather than distinctly claimed, that the state cannot rightly subject a foreign corporation to this burden* (see *Robert Mitchell Co.* v. *Selden Co.*, 257 U. S. 213, 216, 42 S. Ct. 84, 67 L. Ed. 201); but there has been no such distinct holding by the Supreme Court and we think we should accept the Ohio rule as affecting foreign corporations which locate themselves in the state for business purposes."

It will be observed that the Circuit Court of Appeals stated in its ruling that it was accepting what it felt to be the Ohio rule. In other words, if the instant decision under review had been a pronouncement of the Ohio Court when the *Maichek* case was decided by the Circuit Court of Appeals, unquestionably, the Circuit Court of Appeals would have followed the ruling of the Ohio Court—the Federal Courts always follow the rulings of the State Courts in cases of this sort. In any event, the Circuit Court of Appeals did, as we have pointed out, express some doubt as to its holding.

As to the *Bomze* case, *supra*, the Circuit Court said that no Federal question was involved because the cause of action sued on arose in New York out of the very business done in New York by the foreign corporation. As to this

there can be no question for the Circuit Court of Appeals held:

> "In conclusion we hold that the defendant was doing enough business in New York to satisfy the state decisions; and that, since the cause of action arose—at least as to the New York sales—out of these activities which made the corporation 'present' (in New York), any federal question is set at rest." (Parenthetical expression supplied.)

The Circuit Court of Appeals, in reaching its conclusion as above noted, had this to say, from which it is hard to conceive how Petitioner could suggest that decision as being in direct conflict with the decision of the Ohio Supreme Court in question:

> "However, we understand that since Tauza v. Susquehanna Coal Co., supra, the law of New York has been that a foreign corporation is either 'present', or it is not; and once it is found to be 'present', it becomes subject to process, regardless of whether the particular liability in suit has arisen out of the activities which collectively constitute the 'presence'. How far this has been a reflection of what the New York Courts suppose to be the constitutional limit of their powers is not clear. In Lilibridge, Inc. v. Johnson Bronze Co., supra, Finch, J., declared that the state courts should take the federal decisions as their absolute standard, positive as well as negative; but, when the Court of Appeals affirmed the decision; it wrote no opinion.
>
> "If the state courts do take the Supreme Court decisions in both senses: that is, if they regard the inquiry, how far they may go, as coalesced with the inquiry, how far they will go, International Shoe Co. v. Washington, has effected a change. The Supreme Court there declared that the corporation's 'presence' was to be determined by balancing the opposed interests; the convenience of the obligee against the burden upon the corporation. That is a test not different in kind from that which has been repeatedly used, when the inquiry is whether it will 'unduly burden' interstate commerce to fetch a corporation, engaged in such commerce, from

the place of its principal activities to defend the action. *If that be the test, the question at once becomes relevant whether the action is based upon a liability arising out of the local activities;* for it is almost always less burdensome to subject a corporation to the defense of actions so arising than to those arising elsewhere. Indeed, probably some such notion is at the basis of those decisions which permit a state to subject to process in personam transients who, while within its borders, have incurred a liability under its laws."

Petitioner also refers to the case of *Southwick Foundry & Machine Co.* v. *Franz Machine Co.*, 48 Fed. (2d) 714 C. C. A. 6th. In that case, service had been made upon the statutory agent of the foreign corporation and suit had been brought on a cause of action arising outside of the State of Ohio. The Circuit Court of Appeals held that this was a valid service of process. This decision, we submit, is completely consistent with the instant decision under review because in the decision under review, the Supreme Court of Ohio said that such a suit would be entertained by the Ohio Courts, that is, where service was had upon a statutory agent.

(e)

The Ohio Supreme Court decision is in accord with decisions of the Federal Circuit Courts of Appeal.

Not only is the decision of the Ohio Supreme Court not in conflict with the three decisions of the Federal Circuit Courts of Appeal cited by the Petitioner, but we state that the Ohio Supreme Court decision is in accord with decisions of the Federal Circuit Courts of Appeal which have passed on the subject. We shall cite but two of such decisions.

As an instance, we should like to cite the case of *American Indemnity Co.* v. *Detroit Fidelity and Surety Co.*, 63 Fed. (2d) 395 (5th Cir.) where the Court said that the upholding of the service of process in a suit against a foreign corporation "should be confined to suits arising from busi-

ness done" in the State where the suit was brought, and cited Supreme Court cases on the subject.

As another instance, there is the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Rausch* v. *Commercial Travellers Mutual Accident Association of America*, 38 Fed. (2d) 766, (cert. den. 281 U. S. 763, 74 L. Ed. 1171), in which the Court held that service of process in the State of Missouri upon the agent of the insurance company in Missouri on a suit based on a policy contracted for and issued in the State of New York was bad under both the State and the Federal laws.

CONCLUSION.

In conclusion, we should like to state that this Court and the Federal Courts have always held that it is for the State to determine how far it will go in entertaining suits against foreign corporations. This is specifically recognized in, among others, the two cases cited in this Brief—*Robert Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, *supra*, and *Maichek* v. *Bertha Consumers*, *supra*. In the last named case, the Circuit Court of Appeals suggested that there was some doubt as to whether the suit would lie in the Ohio Courts on a transitory cause of action arising outside the State where personal jurisdiction over the corporation depended upon the service on a statutory agent, and in the first mentioned case, this Court said that the indications of the Ohio statutes, so far as they go, look to liability incurred within the State of Ohio, and further suggested that unless the State law, either as written or as construed by the Ohio Courts, were otherwise, this Court would not uphold the validity of the service of process against a foreign corporation on a transitory cause of action.

The Supreme Court of Ohio has now interpreted the Ohio statute with reference to service of process against foreign corporations and limited the validity of such service to situations where the cause of action arose out of something

done by the foreign corporation within the State of Ohio *unless* the foreign corporation had appointed a statutory agent for service of process or *unless* it had otherwise consented to service of process. This, we say, now becomes the law of Ohio, which must be followed by the Federal Courts inasmuch as it does not transcend against anything prohibited by the Constitution of the United States.

For the reasons stated above, and in the foregoing parts of this Brief, we suggest that decision of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

LUCIEN H. MERCER,
CHARLES G. WHITE,
Attorneys for Respondent.

APPENDIX.

REPUBLIC OF THE PHILIPPINES
COURT OF FIRST INSTANCE OF MANILA

Case No. R-53317.

EUGENE ARTHUR PERKINS, *Plaintiff*,
v.
BENGUET CONSOLIDATED MINING CO. and IDONAH SLADE PERKINS, *Defendants*.

DECISION

This case was commenced on July 6, 1938, by the filing of the original complaint against the Benguet Consolidated Mining Company as the sole defendant. The plaintiff prayed for a judgment, ordering the company to pay the plaintiff the unpaid dividends theretofore declared on the 54,870 shares of its stock standing in the name of the plaintiff, which dividends then amounted to ₱71,379.00, as well as such future dividends as might be declared by the said company on the said shares, and recognizing the plaintiff as entitled to the control and disposal of the said shares.

On August 29, 1938, the defendant Benguet Consolidated Mining Company filed its answer, admitting the material allegations of the complaint, but alleging that the company had suspended payment of dividends to the plaintiff on the shares in question, because the plaintiff's wife, Idonah Slade Perkins, had made a claim upon the company for the payment to her of the said dividends, and further alleging that the company had no interest whatsoever in the said shares and was ready and willing to pay such withheld dividends to and recognize the control and disposal of the said shares in such person as the Court may direct and also that Idonah Slade Perkins is a necessary party to the case. On August 30, 1938, the defendant company then filed a motion setting forth the necessity of including the plaintiff's wife, Idonah Slade Perkins, as party, and praying that an order

be issued by the Court requiring the plaintiff to amend his complaint by including said Idonah Slade Perkins as a party, and that summons therein be served according to law.

In September, 1938, the plaintiff filed his amended complaint, supported by an affidavit showing the necessity of service of summons upon the new defendant Idonah Slade Perkins by publication. The Court, thereafter, ordered that service of summons be made upon the new defendant by publication, and such service was duly accomplished. Through counsel, Idonah Slade Perkins appeared specially, and objected to the venue, and also moved to quash the complaint, and demurred to the jurisdiction of the Court. After due hearing, the Court by its order, dated February 21, 1939, denied said motion, and by another order, dated March 31, 1939, also denied the motion for reconsideration of the former order. The counsel accepted to said orders and instituted certiorari proceedings in the Supreme Court. The said Court denied the petition for certiorari in its decision dated November 16, 1939.

In this same case, on order of the Court the plaintiff included in the litigation another defendant, George H. Engelhard, who was claiming or pretending to have a lien over some of the shares in litigation, according to the defendant Benguet Consolidated Mining Company. During the trial of this case, this third defendant was represented by counsel; but on August 16, 1945, the said defendant appeared voluntarily and announced his intention to renounce his claim in this case, and there being no objection to his petition, the Court by order of September, 1945, dismissed the case against the said defendant, as well as his cross-claim.

On January 6, 1940, the defendant Idonah Slade Perkins filed her answer to the amended complaint of the plaintiff, which answer she replaced on July 23, 1940, with a pleading, entitled, "Amended Answer, Special Defenses and Cross-Claims," in which in effect she alleged as a defense

that the New York judgment attached to and made part of her latter pleading is *res adjudicata* on all questions raised in this suit. Plaintiff in his reply to said amended answer, alleged that the judgment of the Supreme Court of the State and County of New York and the decision of the Court of Appeals of that State on which it is based, and upon which the defendant Idonah Slade Perkins relies, are void and of no force or effect whatever, and may not and ought not to be enforced in the Philippines.

The trial of this case was commenced on July 23, 1940, and continued up to January 21, 1941. The plaintiff presented evidence oral and documentary in support of his case as alleged in his amended complaint. After which the defendant Benguet Consolidated Mining Company presented its evidence and closed its defense. The defendant Idonah Slade Perkins, through counsel, refused to present any evidence. In view thereof, the Court permitted the plaintiff to present his evidence in support of his claim that the aforesaid New York judgment was rendered beyond the authority of the Court of Appeals of the State of New York, and as a consequence of which the judgment of the Supreme Court for the State and County of New York in pursuance of the said decision of the Court of Appeals was null and void, and that said decision and judgment were obtained through fraud. When the plaintiff was in the last stages of his cross-examination by counsel for the defendant Idonah Slade Perkins on his evidence on the aforesaid claims, the said defendant Idonah Slade Perkins arrived in the Philippines from the United States and appeared in Court in person on November 4, 1940. She charged her counsel with collusion with the counsel for the other parties, but the Court found her charge to be wholly unfounded. Thereafter, her counsel, Alba Hill, filed his resignation, so that subsequently, the defendant Idonah Slade Perkins conducted her own case. However, by reason of the strange and disorderly conduct and persistent contumacious attitude of the defendant towards the Court, and,

there being nothing more to be accomplished, the case having been concluded for all practical purposes, the Court on January 30, 1941, suspended the proceedings and ordered the plaintiff to institute guardianship proceedings over the person and properties of Idonah Slade Perkins for the purpose of determining her capacity to manage her affairs. While said guardianship proceeding was pending, however, she fled this jurisdiction notwithstanding a warning given to her by the Court not to do so. She left without having appointed any attorney-in-fact to represent her and without advising the Court of any representative in the Philippines to act for her.

During the liberation of Manila, the original records of this case were completely destroyed; but on July 28, 1945, the parties were ordered to reconstitute the same, and on December 27, 1945, the Court declared the records of this case duly reconstituted. On March 27, 1946, in order to put an end to this long pending litigation, the Court required any of the parties herein, desiring to introduce additional evidence to do so within sixty days from the date of the order, after which the case would be considered closed and the Court would thereupon render its decision. None of the parties having introduced any additional evidence nor requested an opportunity to do so, the plaintiff filed an ex parte motion praying that the Court render judgment in this case.

The Court finds the following facts established by the evidence submitted during the trial of this case: The plaintiff is a citizen of the United States of America, although born in Bankok, Siam, on May 6, 1887, of parents who were both citizens of the United States. His parents took the plaintiff soon after his birth to the United States where he spent his boyhood and student days in the State of New York. Immediately after he passed the bar examinations and after taking his oath as a lawyer in New York, he came to the Philippines under contract with the Bureau of Insular Affairs, he having received his appointment in the

Philippine Civil Service before passing his bar examinations, and he has resided in this country ever since. He first worked in the office of the Attorney General of the Philippines. In 1909 he was appointed attorney of the Bureau of Lands; but in 1912 he resigned and went into the private practice of law, and he has since been practicing law in the Philippines. The plaintiff intended to make the Philippines his home ever since he first came here. After he had established himself in Manila, he brought here his mother who brought their household effects with her. A short time after her arrival, she died in Manila and was buried at Cementerio del Norte. The plaintiff later bought a family burial plot. He has all his business and professional interests here, and none elsewhere. He has regularly paid his cedula and residence certificates and all other taxes due from him to the government from 1908. He was married in Manila in 1914 to the defendant Idonah Slade Perkins, as a resident of the city of Manila. He has made only three short vacations to the United States. He was appointed by Governor Smith of New York as Commissioner of Deeds for said State in the Philippines; and to be eligible to such position in a territory beyond the territorial limits of the State, the person appointed must be a resident of the place where he would exercise his functions. The plaintiff built an expensive residence on Dewey Boulevard, and has resided there since its purchase in 1924 and before that he had acquired two other homes in Manila. The defendant Idonah Slade Perkins resided with him in each of said homes from the time of their marriage until 1930 when their family troubles started. No evidence has been offered in this case contradicting the evidence for the plaintiff, and the Court finds, therefore, as proven fact that the plaintiff since his arrival in the Philippines in 1908 to this date has been domiciled in the Philippines.

The Court also finds proven that at the time of their marriage on January 3, 1914, the plaintiff and his defendant wife, Idonah Slade Perkins, were citizens of the United

States, and the plaintiff was a domiciled resident of the city of Manila, and the defendant Idonah Slade Perkins gave as her residence Spokane, Washington; that at the time of their marriage they did not sign any ante-nuptial agreement with respect to their property rights; that by virtue of the defendant's marriage to the plaintiff, she lost her former residence and became a resident of the City of Manila, since the residence of the wife follows that of the husband's; that the espouses not having signed any ante-nuptial agreement regarding their properties, the conjugal property system and law apply to them and hence the conjugal partnership was established between the said spouses and their respective rights should be governed by the provisions of the Civil Code, particularly Arts. 1315, 1392 to 1416, inclusive.

It is admitted by all the parties that the defendant Benguet Consolidated Mining Company is a "sociedad anonima" organized in accordance with the provisions of the Philippine Code of Commerce with head offices in the city of Manila; and that it has mining properties in the Philippines and the situs of its shares of stock is in the Philippines. The evidence for the plaintiff was uncontradicted that the original 24,000 shares of stock of the company involved in this case were formerly standing in the name of the defendant Mrs. Perkins, although they were acquired after January 3, 1914, the date of the marriage of the spouses. It also appears from the uncontradicted evidence that all the shares here in question were purchased by the plaintiff with the funds acquired by him during his marriage with his defendant wife, and therefore, are and should be considered under the law as assets of the conjugal partnership. Moreover, the conjugal nature of the shares of stock in question has been adjudicated by this Court in the previous litigations between the plaintiff and the defendant Idonah Slade Perkins, particularly Civil Case No. 37517 of this Court, entitled "Idonah Slade Perkins versus Eugene Arthur Perkins," wherein the

Court in accordance with the allegations in her complaint found that the shares there in question then, and now here in question, are conjugal property. The decision of this Court was confirmed *in toto* by the Supreme Court of the Philippines in G. R. Nos. 35570 and 35650, entitled "Idonah Slade Perkins versus Eugene Arthur Perkins" and reported in Vol. 57, page 205, of the Philippine Reports, and this Court in aid of execution of the judgment as affirmed by the Supreme Court, ordered "that the certificates of stock Nos. 1484, 1595, 2176, 2238, 2773, 2780 and 2781, which at present appear registered in the books of the Benguet Consolidated Mining Company in the name of the defendant Idonah Slade Perkins be cancelled, and that other and new certificates of stock in the name of the defendant-petitioner, Eugene Arthur Perkins, be issued, and that when these new certificates shall have been issued, they be delivered to said defendant". The Court granted the company a period of five days from the receipt of a copy of the order, within which to comply therewith. In obedience to said order, the company cancelled the old certificates and issued new ones, Nos. 6392 to 6398 for 24,000 shares, in the name of Mr. Eugene Arthur Perkins in his capacity as manager of the properties of the conjugal partnership, without the original certificates having been surrendered by the defendant, Mrs. Perkins, to the company, because she had previously sent them to a bank in New York, and thereafter refused to deliver the same to the plaintiff in spite of her having been ordered to do so by the Court in Civil Case No. 37517.

It is clearly proven by the evidence, therefore, that the shares in question were not purchased by the defendant with money of her own, apart and separate from the funds of the conjugal partnership, but were acquired after the plaintiff and the defendant Mrs. Perkins were married, and during the existence of said marriage with conjugal funds. Therefore, all said shares are and pertain to the conjugal partnership of which the plaintiff is by law the manager

and that the plaintiff, as such manager, is entitled to the control and disposal of the same, and also to receive the dividends declared thereon, and that the defendant company has in fact recognized his rights thereto prior to June 3, 1937, but after said date the company refused to pay the plaintiff the dividends due and payable on said shares and likewise refused to recognize the rights of the plaintiff to control and dispose of said shares. The evidence is also uncontradicted that at the time of commencement of this action there was due and payable to the plaintiff dividends on said shares in the amount of ₱71,379.90.

With respect to the New York judgment, an alleged copy of which was attached to the pleadings of defendant Mrs. Perkins, entitled "Amended Answer, Special Defenses and Cross-claims" dated July 23, 1940, and which judgment is impugned by the plaintiff in his second amended reply, as having been rendered without jurisdiction, and obtained through the perjured and false testimony of the defendant, Idonah Slade Perkins in the aforesaid New York case, the plaintiff proved, upon defendant Mrs. Perkins' failure and refusal to prove her case, his allegations in the said second amended reply, impugning the decision in the New York case. The principal contention of defendant Mrs. Perkins is that the questions raised in the present case have been finally adjudicated by the Supreme Court of the State of New York in its decision dated November 27, 1938, and hence said decision is *res adjudicata*. This Court, therefore is called upon either to uphold the final judgment and order of this Court in the case between plaintiff herein and defendant Idonah Slade Perkins, in Civil Case No. 37517, which final judgment was duly carried to execution after the judgment had been appealed to the Supreme Court of the Philippines, or to enforce the judgment of the Supreme Court of the State of New York, which purports to have rendered void, and of no binding force, the aforesaid final judgments and orders of this Court and the Supreme Court of the Philippines.

This Court after a careful consideration of the facts and the law involved in this case, is constrained to find that the New York judgment of the Supreme Court of the State and County of New York and the decision of the Court of Appeals of said State on which it is based and which defendant Idonah Slade Perkins relies, are void and of no force and effect, and may not and ought not to be enforced in the Philippines, because said judgment and decision fail to afford full faith and credit to the judgments, orders and decrees of the Philippine Courts, involving the same issues, as was incumbent on the courts of the State of New York to do, by virtue of Section 905 of the U. S. Revised Statutes; and that the Supreme Court of the State and County of New York as well as the Court of Appeals of said state had no jurisdiction to determine, as they did purport to determine, the ownership of the shares of stock of the Benguet Consolidated Mining Company, said company, being a "sociedad anonima", having its situs in the Philippines. This Court, therefore, concludes that the New York judgment, which the defendant Idonah Slade Perkins invokes as *res adjudicata* on the issues involved in the present case, has no binding effect in this jurisdiction and the same is not *res adjudicata* in this case, and that the prior orders and decrees of the Supreme Court of the Philippines are the only binding precedents.

This Court also holds that the New York court had no power and authority to determine the ownership of the shares of stock of the Benguet Consolidated Mining Company, because in regard to the shares of stock of a corporation, it is well-established that for the purpose of determining the law governing the ownership of such stock, it is considered immovably situated in the domicile of the corporation which created it, and in the jurisdiction of the country by virtue of the laws of which it has its being. The mere fact of the accidental presence of the certificates in question in New York gave the New York Court no jurisdiction over the shares themselves, and hence, said

Court had no more power or jurisdiction to try the title to the shares than they would have power to try the title to land outside of the State. Consequently, the New York decision purporting to adjudicate ownership of such shares to Idonah Slade Perkins is null and void and of no binding force in this jurisdiction.

Finally, the Court finds that the defendant Benguet Consolidated Mining Company has no interest in this case other than to comply with orders from this Court in respect to the 52,874 shares standing in the name of the plaintiff Eugene Arthur Perkins, and the accrued dividends on the same amounting to ₱71,379.90 which at the time of the filing of the complaint had been declared as dividends on said shares and has been withheld by it awaiting adjudication of the person entitled thereto, and likewise to pay subsequent dividends accruing thereon. The Court, moreover, finds that the cross-claims of defendant Idonah Slade Perkins against the plaintiff and the defendant Benguet Consolidated Mining Company have not been proven.

In View of the Foregoing Considerations, judgment is hereby rendered in favor of the plaintiff and against the defendants, Benquet Consolidated Mining Company and Idonah Slade Perkins, ordering, adjudging and decreeing:

(1) that the plaintiff Eugene Arthur Perkins, as the manager of the conjugal partnership between himself and the defendant Idonah Slade Perkins, is the only person entitled to the possession, control and disposal of all shares of the Benquet Consolidated Mining Company, standing in his name in the books of said defendant Company, particularly the 52,874 shares of stock heretofore mentioned, and any stock dividend declared thereon, including the right to receive the dividends heretofore declared thereon in amount of ₱71,379.90, as well as such dividends as have hereafter been declared and shall be made payable on said shares, while he holds the same;

(2) that the defendant Benguet Consolidated Mining Company recognize the ownership, title, and right of disposal of the plaintiff herein in and to the 52,874 shares of its stock, and pay him the amount of ₱71,379.90, being the dividends declared on said shares including interest thereon at the rate of 6% per annum from July 6, 1938; and pay to said plaintiff any and all dividends heretofore declared and made payable on said shares or which may hereafter be declared and made payable thereon, while he continues to hold the same; and,

(3) that the cross-claims of defendant Idonah Slade Perkins against the plaintiff and the defendant Benguet Consolidated Mining Company be dismissed, with costs against said defendant.

So Ordered.

Manila, April 23, 1947.

Rafael Dinglasan
Judge.

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IN THE

Supreme Court of the United States

October Term, 1951

No. 85

IDONAH SLADE PERKINS,

Petitioner,

v.

BENGUET CONSOLIDATED MINING COMPANY,

Respondent.

RESPONDENT'S PETITION FOR REHEARING

LUCIEN H. MERCIER,
716 Metropolitan Bank Bldg.,
Washington 5, D. C.,
and
CHARLES G. WHITE,
First National Bank Bldg.,
Batavia, Ohio,
Attorneys for Respondent.

ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
808 Traction Building,
Cincinnati 2, Ohio,
Attorneys for Petitioner.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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RESPONDENT'S PETITION FOR REHEARING

This Petition for Rehearing is respectfully addressed to the Court because Respondent believes the Court will, without question, want to correct a situation brought about by its Opinion of March 3, 1952, in this case which can result in nothing but a substantial, if not complete, injustice to the Respondent.

Respondent entirely agrees with the very lucid expressions by this court as to the principles of law which are to be borne in mind as to the demands and permissions of the due process clause of the 14th Amendment; and believes that the opinion of this Court on such principles will do much to remove the confusion which has existed in legal minds for some time.

The sole question presented to this Court, however, was whether or not the Supreme Court of Ohio was in error in applying the due process clause of the 14th Amendment of the Constitution of the United States to this case. The question of fact as to the nature and the extent of "doing business" was not before this Court for determination and was not argued, but this Court nevertheless proceeded to pass on it in such a manner as to be almost considered as a finding of fact. We do not believe that the Court intended to make such a finding nor do we believe that this Court intended (to paraphrase the statement from the opinion of Justice Minton) to "gratuitously advise" the Supreme Court of Ohio on the question of fact in this case. These facts were neither presented in their entirety, as there were numerous exhibits not actually before the court for consideration which could very probably have led to a different conclusion.

In its aforesaid opinion, this Court said that Rsepondent was "carrying on in Ohio, a continuous and systematic, but limited, part of its general business"; which findings are predicated upon what this Court stated in the opinion are "facts . . . substantially beyond controversy."

With this statement of the matter, Respondent is not and cannot in any wise be in agreement; and the Record before this Court, it is respectfully submitted, does not permit such a predicate or conclusion. Actually, the record facts are contrary to those pictured by this Court in its opinion. Not only are they to the contrary, but there was no evidence introduced which could place such contrary facts in dispute.

The Court fell into error in this situation by adopting as "facts . . . substantially beyond controversy" the recital appearing in the decision of the Court of Appeals of the State of Ohio in this case—88 O. A. at 119-125, 95 N. E. (2d) at 6-9. This recital by the Court of Appeals was not, how-

ever, as to facts proven "substantially beyond controversy" but was merely a recital of the *claims made* as to what the facts were—claims on the one hand by the Petitioner, and on the other hand by the Respondent. What this Court adopted as "undisputed facts" were practically the claims of the Petitioner; but these claims of the Petitioner, so far as the Record is concerned, were merely wishful thinking that they were so without evidence to substantiate them.

A reading of the Record before this Court will demonstrate beyond a reasonable doubt what Respondent asserts, and Respondent will proceed to demonstrate this from the Record; but before doing so, Respondent would like to say that it feels certain that this Court did not intend to make findings of fact to bind the Supreme Court of Ohio on the Remand to it, and also that the decision of this Court could just as well have been rendered on assumptions rather than as a result of attempting to find what the facts were.

The findings of facts made by this Court which are actually contrary to the record facts and which, being to the contrary, could not support this Court's holding of a "continuous and systematic, but limited" conducting in Ohio of "part of its general business" by Respondent, are as follows:

1. Respondent's President and General Manager was not Respondent's principal shareholder as this Court found.
   a. The record (p. 115), and which was not contradicted in any way, and could not be, shows him to be the owner of but 114,738 shares out of a total of 12,000,000 shares; that Allen & Company had purchased along before suit 2,203,600 shares of the stock from Haussermann family trusts (p. 125, 178); that Allen & Company had registered about 700,000 shares with the S.E.C. to be sold (R. p. 161, 179); that Petitioner herself claimed to be the

owner of more stock, 144,000 shares, than was owned by Respondent's President and General Manager; and that Respondent had about 10,000 stockholders (R. p. 122).

2. Respondent's President and General Manager spent less than half of his time in Ohio from 1941 to date of suit (the years during which he could not return to the Philippines because of the war).
   a. This was not contradicted in any way, and could not be.
   b. This absence from Ohio is inconsistent with what this Court has termed a *carrying on in Ohio* of a "continuous and systematic supervision of the necessarily limited wartime activities of the company."
   c. If we assume that this over 50% absence from Ohio from 1941 to date of suit occurred continuously from April, 1944 to the end of March, 1947, which is an assumption just as fair to make as any other, and the testimony was uncontradicted that for a long period Respondent's President and General Manager came to Ohio but for weekends, being pretty much in Washington or New York practically all of the time (R. p. 171), would this not be completely inconsistent with the Court's findings.

3. Respondent's files and records were not kept in the personal office in Ohio of its President and General Manager.
   a. The uncontradicted record (pp. 149, 153, 157, 158, 159, 162 and 163) were that such files and records of the Company as were in the possession at his home—not his office—during the war were returned to the Philippines in 1946, at war's end; and that all that the President and General Manager had at his personal office which belonged to Respondent were a few cancelled checks, a used check book stub, a check book and two unused check books (R. p. 171, 175).

4. This Court further finds that Respondent's President and General Manager carried on from his own personal office correspondence relating to the business of the Company and to its employees.
   a. It is true that correspondence was carried on with the employees of the company and with company's general counsel in Washington, and that other correspondence was carried on relating to the employees of the company, but we know of no record facts which show that Respondent's President and General Manager carried on "business correspondence" (R. pp. 148, 157, 158, 159, 163). All the files of Respondent's President and General Manager, which were in his private office in New Richmond, Ohio were brought to the Court pursuant to a subpoena (R. p. 148); and it is rather significant that no extracts from these files were ever made by petitioner to show "business correspondence" to the lower court, to the Court of Appeals or to the Ohio Supreme Court, and Respondent's President and General Manager was cross-examined at length on these files as the record will show. (Pages above.)
5. Respondent's President and General Manager had but one secretary, and not two, at and before suit. This is uncontradicted (R. p. 152). He did have to hire a secretary after the suits were filed to do a lot of copying. This one secretary which he had at and before suit was his own personal secretary for his personal business, and was a secretary of Respondent and paid from Respondent's funds only for a short while (R. pp. 150 and 208). Her salary then was not paid fully by Respondent, but one-half by Respondent and one-half by Balatoc Mining Company (R. p. 208). She was paid one-half from Respondent's funds only during the pendency of the application to register stock before the Securities and Exchange Commission (R. p. 150); which registration of stock was made on behalf of Allen and Company to sell 700,000 shares out of the stock of Respondent which

they owned (R. p. 161), and which registration was entirely at the expense of Allen & Company (R. p. 179).

6. No machinery, supplies or equipment were purchased in Ohio from any Ohio concern, and none were purchased by Respondent's President and General Manager because he knew nothing of these matters (R. pp. 103, 121, 132, 139).

7. No people having business with Benguet ever came to the personal office maintained by Respondent's President and General Manager, which personal office was maintained as his loafing place since years ago when he came on vacations to the United States (R. pp. 102, 170, 171).

8. There was no testimony that Respondent's President and General Manager, from his personal office in Ohio, or elsewhere in Ohio, supervised policies dealing with the rehabilitation of Respondent's properties in the Philippines.

   a. The only testimony on this score, is contained at pages 146 and 148 of the Record, and has not been contradicted in any way.

9. Respondent's President and General Manager has been a resident of the Philippines ever since 1898; was in the United States at time of suit only because of an exigency of the war and because he could not procure suitable transportation back to the Philippines—he did have such transportation to go back to the Philippines at the time of suit, which he had been endeavoring to procure since the war's end (R. pp. 98, 99, 124, 101). He had come here in 1941 merely on personal matters with reservations to return in late 1941 which were cancelled by our government, and he was then stranded here by reason of war (R. 99).

10. Respondent's President and General Manager was not in Ohio acting in that capacity as stated in the Opinion.

a. As stated in No. 9 above, he was in Ohio because that was the home which he maintained to come to during vacations from the Philippines where he had lived continuously since 1898, excepting for vacations. This is in no wise contradicted in the record.

b. In order that the President and General Manager might be in Ohio acting in that capacity, there would have had to be some business of the company in Ohio requiring his presence here in his said capacity to attend to; and yet there is not one iota of evidence that Respondent had any business whatsoever to be done in the State of Ohio or that Respondent's President and General Manager was here because any business of Respondent required him to be here.

Without going into any further details, we should like to again respectfully suggest that the decision of this Court in this case could just as well have been rendered by a mere assumption of the facts which this court proceeded to find rather than making a specific finding of facts which happen to be contrary to the Record.

The Supreme Court of Ohio never passed upon the question of whether or not the Respondent was doing business in the State of Ohio, and its decision was based entirely on the assumption that even if it were doing business in Ohio, suit could not be entertained against Respondent on a transitory cause of action because it was a foreign corporation. This Court has now said that there was no such prohibition generating from the due process clause. Therefore there was no necessity to find facts in order to correctly advise the Ohio Supreme Court in the present situation.

Respondent could probably go along with this Court's findings of facts if it had been so that Respondent had, prewar, conducted any part of its general business in the

United States or in Ohio, but this was never so; and Respondent could probably go along with the finding if its President and General Manager was customarily located in the State of Ohio, and there performing duties for Respondent. When the situation before the court is, however, that of an officer who has been living at the principal and only place of business of Respondent since 1898, and comes to this country on purely personal matters, and who is prevented from returning to the Philippines because of an act of war, it is difficult to conceive how the foreign corporation could be brought to whatever place he might happen to locate while unable to return to the place where he has lived for approximately forty years.

Respondent had no business in Ohio which required its President and General Manager to be in Ohio; and actually Respondent's President and General Manager was outside of the State of Ohio more than half of his time during the period in question.

The rationale of all of the decisions touching situations of this sort, which includes many, many decisions of this court which to this day stand unreversed, is that before a foreign corporation will be found to be present in the state where suit is brought, it must be found that the foreign corporation must have had something to be done in that state for which an officer of the corporation was there to represent it. As stated in *St. Clair* v. *Cox*, 106 U.S. 350, which case stands as a leading one on the subject to this day, before an officer of a company may be labeled as representing the foreign corporation in a state, the foreign corporation must have business in the state for the transaction of which it sends, or appoints, or maintains an agent there.

This court has repeatedly held that an officer of a corporation does not take the corporation with him wherever he goes

St. Clair v. *Cox*, 106 U. S. 350;
Remington v. *Central Railway Co.*, 198 U. S. 95;
Kendall v. *American Automatic Loom*, 198 U. S. 477;
Greene v. *C. B. & Q. Rwy. Co.*, 205 U. S. 530;
Riverside Mills v. *Menefee*, 237 U. S. 189;
Phila. & Rwy. Co. v. *McKibbin*, 243 U. S. 269;
Toledo Rwy. etc. Co. v. *Hill*, 244 U. S. 189;
Rosenberger v. *Brown*, 260 U. S. 516.

The rationale of the decisions of this court are very well put in the decision of the 5th Circuit Court of Appeals in the case of *Atchison, T. & S. F. RR. Co.* v. *Weeks*, 254 Fed. 513, cert. den. 248 U. S. 602, where it was said:

> "The doing of business which is entirely incidental to the main business especially if it be interstate in its character will not evidence an intention of the corporation to subject itself to the local laws. This may extend even to the maintenance of offices within the State and the employment of such clerical help as may be necessary without having such effect. *Greene* v. *C. B. & Q. Rwy. Co.*, 205 U. S. 530. . . .
>
> "The conclusion is reached that where a corporation is not undertaking to do within the state any of these things which it is incorporated to do, the only business done within the State being by a manager who gives direction for the operation of the business of the corporation in other States, using only the necessary clerical force to that end, and utilizing the United States mails and interstate transportation in the conveyance of directions, the corporation is not to be regarded as doing that character of business which would be equivalent to the presence within the state of the corporation, and which would be the essential basis for a personal judgment against the corporation within the state for a tort committed in another State."

The books are filled with cases, practically all of which are based on decisions of this Court, to the effect that the

doing of the following cannot be considered to be the "doing of business" within the state by a foreign corporation which would authorize or sustain service of process against the foreign corporation in an action in personam based on a transitory cause of action:

1. Buying machinery, supplies and equipment, even from an office maintained in a state by a foreign corporation does not constitute "doing business!"

   Rosenberger Bros. Inc. v. *Curtis Brown*, 260 U. S. 516.
   Macario v. *Alaska Mining Co.*, 165 PAC 73;
   Greenberg v. *Lamson Bros.*, 119 N. Y. 269;
   Bank of America v. *Whitney Central National Bank*, 261 U. S. 171, and many other cases.

2. Having a stock transfer agency, holding directors meetings, drawing on checking accounts, maintaining correspondence with company officials elsewhere, even if all done in an office in the state by a foreign corporation does not constitute "doing business" within that State;

   Consolidated Iron and Steel Co. v. *Maumee Iron and Steel Co.*, 284 Fed. 550;
   Honeyman v. *Colorado Fuel & Iron Co.*, 133 Fed. 96;
   People v. *Equitable Trust Co.*, 96 N. Y. 387;
   People v. *Horn Silver Mining Co.*, 105 N. Y. 76;
   People v. *Fitner*, 76 N. Y. S. 1017;
   Wadsworth v. *Equitable Trust Company*, 138 N. Y. S. 842;
   Warren Tool & Forge Co. v. *Marcus*, 39 Ohio App. 38;
   Dickey v. *Dayton Globe Iron Works Co.*, 19 Ohio N. P. (N. S.) 492;
   Atchison Topeka & S. F. RR. Co. v. *Weeks*, 254 Fed. 513; (CCA 5th Cir., cert. den. 248 U. S. 602);
   Green v. *C. B. & Q. RR. Co.*, 205 U. S. 530;
   Fletchers Cyclopedia on Corporations, Vol. 18, pages 346, 347 and 348;
   Barrow Steamship Co. v. *Kane*, 170 U. S. 111.

So much for the findings of facts and for the rationale of the decisions of this and other Courts. There is one

final matter, however, which we feel should be brought to the attention of this Court, and that is, that the instant cases came up from the lower court, the Common Pleas Court of Clermont County, Ohio, on an appeal merely on a question of law, and not on a question of law and fact, Petitioner having reduced her appeal to one on a question of law only (R. p. 210, under dates April 14 and May 6, 1949). Thus, a review of the facts by the Appellate Court of Ohio, and by the Ohio Supreme Court was limited to the very narrow issue as to whether, as a matter of law, the trier of the facts was wrong in the conclusion which he reached from the evidence before him that—

> "2. That John W. Hausserman, upon whom summons was attempted to be served, was not the managing agent of the defendant, Benguet Consolidated Mining Company, within the meaning of the Ohio statute governing service of process on foreign corporations.
>
> "3. That the defendant, Benguet Consolidated Mining Company, was not doing business in Ohio in such a sense or in such manner as to authorize a valid service of summons upon it under the laws of the State of Ohio; and that it had no business within Ohio requiring an agent in Ohio to manage and conduct the same" (R. pp. 10-11).

This is the Ohio practice; and it would seem to counsel for Respondent that this Court is bound by the limitations of the practice in Ohio to the same extent as the Court of Appeals of Ohio and the Supreme Court of Ohio. The Court of Appeals of Ohio, after reviewing the many decisions on the question of doing business, and the legal principles to be applied in determining as to whether or not there was such a doing of business as would permit the sustaining of process, had this to say:

> "It must be apparent that no useful purpose would be served by comparing or considering the host of authorities to be found upon this question. Enough

has been noted herein to indicate the general rules applicable and that essentially a factual issue is presented to the trier of facts, which in the cases before the court was the trial judge.

"The trial court upon such consideration of the evidence presented found in favor of the defendant upon the motion to quash. It cannot be said that his conclusion was contrary to law, or that, as a matter of law, he was in error in finding that the motions to quash should be sustained. His judgment is before this court, predicated upon the evidence before him. The record does not sustain the claim of the plaintiff that he was in error, either upon the law or the facts."

CONCLUSION

For the reasons above stated, we respectfully request that the Petition for Rehearing be granted, and that the Court modify its Opinion to assume facts and to omit any actual findings of facts.

Respectfully submitted,

LUCIEN H. MERCIER,
CHARLES G. WHITE,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent do hereby certify to this Court that this Petition for Rehearing is filed in good faith, in an earnest endeavor to correct a situation which might be of substantial, if not entire prejudice to Respondent, and in no way for the purpose of delay.

Done at Batavia, Ohio, this 12th day of March, 1952.

Lucien H. Mercier

LUCIEN H. MERCIER,

Charles G. White

CHARLES G. WHITE.

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IN THE

Supreme Court of the United States

October Term, 1951

No. 85

IDONAH SLADE PERKINS,

Petitioner,

v.

BENGUET CONSOLIDATED MINING COMPANY,

Respondent.

RESPONSE OF PETITIONER ON RE-HEARING

ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
808 Traction Building,
Cincinnati 2, Ohio,
Attorneys for Petitioner.

LUCIEN H. MERCIER,
716 Metropolitan Bank Bldg.,
Washington 5, D. C.,

and

CHARLES G. WHITE,
First National Bank Building,
Batavia, Ohio,
Attorneys for Respondent.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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Supreme Court of the United States

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IDONAH SLADE PERKINS, *Petitioner;*

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BENGUET CONSOLIDATED MINING COMPANY, *Respondent.*

RESPONSE OF PETITIONER ON RE-HEARING

The petition of the respondent for a re-hearing is unique in that it does not ask the court to change its decision, but merely to change some language in the opinion.

Objection is taken to the summary of facts on doing business gleaned from the opinion of the Court of Appeals of Ohio in 88 Ohio App. at 119-125. The summary made by Mr. Justice Burton is a fair and accurate statement of the findings from the facts and evidence made by the Court of Appeals, and should not be disturbed.

Respondent states at the bottom of page 2 of the petition that "The Court fell into error in this situation by adopting as 'facts . . . substantially beyond controversy,' and then adds that the recital of facts was "merely a recital of the claims made as to what the facts were."

The Court of Appeals in summarizing the evidence, stated its conclusions were based on "*The facts* upon which plaintiff predicates her claim" (88 Ohio App. 119) and "on the other hand, the defendant points to the following *evidence.*" Justice Burton properly pointed out that such facts and evidence were "substantially beyond controversy." Anyone reading the record without a jaundiced eye, would come to the same conclusion.

There can be no dispute that John W. Hausserman and his family were the largest shareholders; (R. 116), that he was president, general manager and representative of Benguet in the United States, (R. 116). He even spoke of Benguet as "my baby" (R. 162). It was clear that he did have files of Benguet at New Richmond; (R. 147, 148); that he did sign purchase orders there; (R. 153-156); that the assistant secretary at his office was paid half of her salary by Benguet and half by Balatoc, a subsidiary, (R. 150-51), and that checks were transmitted and correspondence carried on from and to New Richmond (R. 147, 148). He was designated as parent of the company, and even had power of attorney from his two sons as directors, so that he could control proceedings. (R. 113-116), The purchase orders themselves, the checks and correspondence, all emanated from New Richmond, where he was also a resident. (R. 159); (R. 124). The fact is that Benguet did not suspend operations, but kept doing some business. Whatever business was done, and there was sufficient for Haussermann to draw a salary as president and general manager, all originated in New Richmond. (R. 122)

Respondent wants this court to make special findings not based on the record, and not based on the Court of Appeals findings, which Justice Burton fairly and accurately summarized. There, is, therefore, no substance in the petition for re-hearing.

Actually he is asking this court to review the findings of the Court of Appeals *de-novo,* which Justice Burton adopted and summarized. This court actually went no further than to say that the facts justified the assumption by the Supreme Court that Benguet was doing business in Ohio. It left, however, to the Supreme Court of Ohio the question whether jurisdiction would be entertained on the particular facts and circumstances in the case. No further clarification is necessary, and the cause can finally be determined in Ohio without future re-course by either side to this court, unless the Ohio court again grounds its decision on an irrelevant premise.

Of course, the more important question is the statement of the court that

> "Also without merit is the argument that merely because Ohio permits a complainant to maintain a proceeding *in personam* in its courts against a properly served non resident natural person to enforce a cause of action which does not arise out of anything done in Ohio, therefore, the Constitution of the United States compels Ohio to provide like relief against a foreign corporation."

We feel the court has not considered that statement in connection with *Hughes* v. *Fetter,* 341 U. S. 609 and *First National Bank of Chicago* v. *United Air Lines, Inc.,* (No. 349) 20 U. S. Law Week 4160. The discrimination goes somewhat deeper in this case. No matter how much business a foreign corporation does in Ohio, this court states it would be proper to exclude actions against it, unless it has appointed a statutory agent. If such be the rule, then foreign corporations can escape process merely by failing to appoint a statutory agent, and yet continually increase the volume of business in Ohio. Of course, as is indicated in footnote 2 of the opinion, such is not the law in Ohio,

but such a classification should not have sanction of this court from a constitutional standpoint.

While petitioner has not asked for a re-hearing, if there is to be one, then that paragraph should be reconsidered. We feel certain that the court will overrule petition of respondent summarily.

Respectfully submitted,

ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN.
Attorneys for Petitioner.